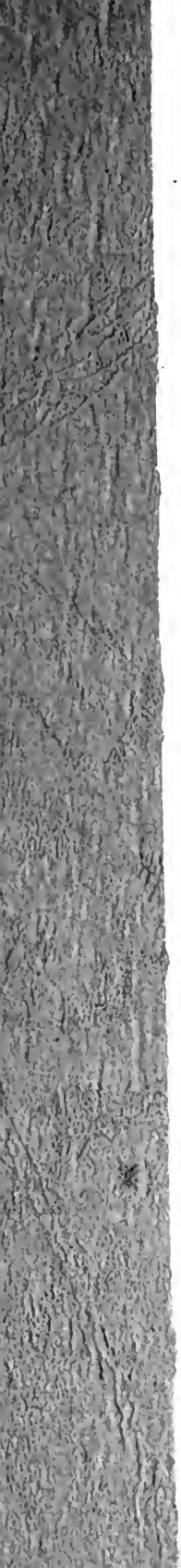

ILLUSTRATIVE CASES

IN

PERSONALTY

BY

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PREFACE.

These cases have been selected, not as leading cases, but as illustrative cases, to be used in connection with my lectures before the law classes in the Detroit College of Law. It is not pretended that the subject of Personal Property has been covered by these cases, but simply that some of the principal subdivisions have been illustrated.

PHILIP T. VAN ZILE,
Dean Detroit College of Law.

Detroit, Mich., July 24, 1896.

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Confusion of Goods.

Confusion of goods takes place when there is such a mixture of the goods of two or more parties that they cannot be distinguished. This may be

1. **By consent of parties.**
2. **By mistake.**
3. **By inevitable accident.**
4. **By the wrongful act of one or more of the parties.**

Patents.

Copyrights.

Trade-Marks.

Gifts.

Gifts are of two kinds:

1. **Gifts inter vivos.**
2. **Gifts causa mortis.**

1. GIFTS INTER VIVOS.

Decedent deposited bonds and coupons with a bank, and took a writing, signed by the cashier, acknowledging their receipt, and that they were "to be sold, and the proceeds placed to her credit." *Held*, that a delivery of the receipt, with an indorsement thereon, signed by decedent, requesting the cashier to "let" plaintiff "have the amount of the within bill," and with the intention to pass title thereto, constituted a valid gift of the money due from the bank.

An action ex contractu, brought by an administrator to recover money claimed to have been wrongfully paid to defendant by a certain bank, constitutes an election and ratification of the payment, and precludes a subsequent action against the bank on the same claim.

Delivery is necessary to the validity of the gift.

A gift inter vivos, when complete, cannot be revoked.

2. GIFTS CAUSA MORTIS.

Both delivery and apprehension of death from present disease or impending danger are essential to the validity of a gift causa mortis.

A gift causa mortis, differing from a gift inter vivos, may be revoked at any time before the death of the donor, even though it has been delivered.

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CASES REPORTED.

ILLUSTRATIVE CASES

IN

PERSONALTY.

BUHL v. KENYON.

(11 Mich. 249.)

Supreme Court of Michigan. May 12, 1863.

Error to circuit court, Wayne county.

The opinion states the case.

Walker & Kent, for plaintiffs in error. Wells & Hunt and E. Hall, for defendant in error.

CAMPBELL, J. The plaintiffs in error brought ejectment in the court below as execution purchasers of the interest of one of two tenants for years of certain premises in Detroit, which were sold as real estate.

The first question presented is whether such an interest in real estate is within the meaning of the statutes relating to the levy and sale of lands on execution. The statute provides that, where not inconsistent with the manifest intent of the legislature, "the word 'land' or 'lands' and the words 'real estate' shall be construed to include lands, tenements and real estate, and all rights thereto, and interests therein." 1 Comp. Laws, § 2.

By section 3119 of the Compiled Laws, provision is made for selling "all the real estate of a debtor, whether in possession, reversion, or remainder, including lands fraudulently conveyed with intent to defeat, delay or defraud his creditors, and the equities and rights of redemption hereinafter mentioned." By section 4463, in the general chapter on "Judgments and Executions," it is declared that "all chattels, real or personal, and all other goods liable to execution by the common law, may be taken and sold thereon," except as is otherwise provided by law.

As a leasehold interest of this kind is a chattel interest, and as it is in this last section classed among personal property, if it should be held included in the class of real estate also, some confusion must necessarily arise. But as we have heretofore held in Trask v. Green, 9 Mich. 358, and Maynard v. Hoskins, 9 Mich. 485, the statute definition of real estate does not apply in its full breadth to execution sales, because incompatible, when thus applied, with the general intent as well as the special clauses of the statutes governing these. We think the case of a chattel interest is not within the law applicable to the sale of lands on execution. Such interests have always been sold as personalty on common-law executions, and it would require plain language to deduce an intent to make them disposable otherwise. But, apart from the fact that they were so liable when lands were not, the statutory provisions governing real-estate sales are not compatible with the idea that these can be included within them. There are multitudes of leases for short periods where a sale would be entirely nullified by a 15-months period for redemption. The whole machinery for land sales is devised with a view to reach freehold estates. The lands are sold in parcels, the papers are filed in the office of the register of deeds, successive sales may be had of the rights to redeem, and various other incidents—all inconsistent with any such interest as is here in question—show that the property sold as real estate is an estate of a more permanent character, and involving a different kind of ownership.

It is claimed, however, that a sale which will pass realty must be good to pass personalty. So far as the documentary evidences of sale are concerned, this is true. But a sale on execution is designed to produce the best price which can be obtained; and a sale on condition that no title shall vest for 15 months would, under ordinary circumstances, render a lease nearly valueless, besides involving the danger of forfeiture. No bidder would give for the shortened term the value of the full term.

We, therefore, are of opinion that no title passed to the plaintiffs by their execution sale. As this disposes of the whole controversy, we make no reference to the other points involved.

The judgment below is affirmed, with costs.

The other justices concurred.

See Grover v. Fox, 36 Mich. 453–459.

SPOONER v. BREWSTER.

(3 Bing. 136.)

Trinity Term. 1825.

Trespass for seizing, cutting, damaging, and destroying, divers tombstones and gravestones of the plaintiff, and with chisels and other instruments cutting out and erasing therefrom divers inscriptions, letters, and figures of the plaintiff, and taking and carrying away the same stones, and converting them to defendant's own use.

Plea, general issue.

At the trial before Best, C. J., Middlesex sittings after last Easter term, it appeared that one Gravenor had in 1815 married the daughter of the plaintiff, who having been convicted of purchasing government stores, was then undergoing sentence of transportation in New South Wales. Mrs. Gravenor died in 1816, when the plaintiff being still abroad and under sentence, his wife erected and paid for a tombstone to her daughter in Bethnal Green church-yard, and some little time after caused to be inscribed upon the stone the words "The Family Grave of John and Sarah Spooner." In January 1825 the defendant (by direction of Gravenor who had paid for the grave) took up the tombstone, and immediately conveyed it to his workshop. While he was in the act of removing the stone he received a prohibition from the plaintiff, whose consent had been asked and refused: and after the stone had been removed from the church-yard, notice was given him by the plaintiff not to alter it; this notice he promised to observe, but subsequently said he was indemnified, and would alter it; he then obliterated the words "The Family Grave of John and Sarah Spooner," and added the record of the death of Gravenor's two children.

It was objected on the part of the defendant that the freehold of the church-yard being in the parson, the plaintiff could not maintain trespass for what the defendant had done.

A verdict, however, was found for the plaintiff, with leave for the defendant to move to enter a nonsuit instead.

Wilde, Serjt., for defendant.

BEST, C. J. There is no doubt that some action may be maintained for the injury of which the plaintiff complains. Lord Coke says the parson in such a case "is subject to an action to the heir." Co. Litt. 18b. But this passage does not state what form of action is to be adopted. The observance of forms is indeed material for the purposes of justice, but upon consideration we are all of opinion that the form which has been chosen in the present instance is right. There are many authorities which show that the heir may maintain an action in cases of this kind: so also the owner of a pew for violations of the right to enjoy it. In general that right is conferred by the ordinary, and case is the remedy for a mere obstruction; but in Dawtrie v. Dee, 2 Rolle, 140, it is said, if the pew itself which the party has put up, be broken, trespass lies. That case has, I understand, been somewhere doubted, but I think it consistent with law and good sense, and it agrees with the decisions in 9 Ed. IV. p. 14, pl. 8. In Moore, 878, Lady Grey's Case is cited, and trespass said to be the proper form.

In a case like the present, where it is clear some action is maintainable, one instance is sufficient to decide the form. As to the cases of felony the distinctions in favorem vitæ are exceedingly nice, but even in those cases a slight interval between severance and removal, will make the thing removed a chattel. The defendant here subsequently to the removal of the stone, was cautioned not to obliterate the inscription, and he promised to abstain from doing so: but afterwards, saying he was indemnified, effected the erasure complained of. It has been urged that the freehold of the churchyard is in the parson; that is undoubtedly true, but even he has no right to remove the tombstones, the property of which remains in the persons who erected them.

The rest of the court concurring, the rule was refused.

REIFF v. REIFF.

(64 Pa. St. 134.)

Supreme Court of Pennsylvania. Jan. 19, 1870.

Error to court of common pleas, Montgomery county.

The facts sufficiently appear in the opinion.

D. H. Mulvany and R. C. McMurtrie, for plaintiff in error. G. R. Fox, for defendant in error.

READ, J. The plaintiffs in error were the lessees of a farm of 152 acres from their mother, a widow, who had a life estate in it under the will of her husband, their father. They were annual lessees from the 1st of April, 1866, 1867, 1868, the widow dying on the 15th June, 1868. At the time of her death there was standing uncut on the premises a quantity of mixed timothy and clover grass, a quantity of grass part meadow and part timothy, and a quantity of timothy exclusively. The question was, was this grass emblements, belonging to the tenants of the deceased owner of the life estate? The vegetable chattels called emblements are the corn and other growth of the earth which are produced annually, not spontaneously, but by labor and industry, and thence are called fructus industriales. The growing crop of grass, even if grown from seed, and though ready to be cut for hay, cannot be taken as emblements; because, as it is said, the improvement is not distinguishable from what is natural product, although it may be increased by cultivation. 1 Williams, Ex'rs, 670, 672.

The learned judge in the court below is a practical farmer, thoroughly acquainted with the established usages of our state, and we have no hesitation in agreeing with him that this crop of hay was not emblements, and belonged to the executors of the testator. Judgment affirmed.

See Evans v. Iglehart, 6 Gill & J. 171; Clark v. Harvey, 54 Pa. St. 142; Sanders v. Ellington, 77 N. C. 255; Lamberton v. Stouffer, 55 Pa. St. 284.

MONDAY v. O'NEIL.

(63 N. W. 32, 44 Neb. 724.)

Supreme Court of Nebraska. April 5, 1895.

Error to district court, Dodge county; Sullivan, Judge.

Action of trover by Daniel Monday against William O'Neil. Judgment for defendant, and plaintiff brings error. Affirmed.

D. M. Strong and Frick & Dolegal, for plaintiff in error. C. Hollenbeck, for defendant in error.

IRVINE, C. This case was tried in the district court on a stipulation of facts. The court instructed the jury to return a verdict for the defendant, and from the judgment rendered thereon the plaintiff prosecutes error. The action was one in the nature of trover for 80 acres of corn grown, and a part thereof, standing on the W. ½ of the N. W. ¼ of section 13, township 18, range 5, in Dodge county. The essential facts, as disclosed by the stipulation, are as follows: On the 14th day of January, 1889, one Stanford, who was then the owner of the land described in the petition, executed a mortgage thereon to the J. T. Robinson Notion Company. On the 3d of January, 1891, an action was brought to foreclose this mortgage, the parties defendant being Stanford and wife and O'Neil, the defendant in this case; the petition alleging that O'Neil claimed a leasehold interest in the premises, but that such interest was inferior to the interest of the plaintiff. All the defendants made default, and on April 23, 1891, a decree of foreclosure was rendered. On June 26, 1891, the land was sold under the decree of foreclosure to the plaintiff. On the 27th of June the sale was confirmed, and a deed executed, which was the same day recorded. O'Neil was the tenant of Stanford for one year from March 1, 1891, and the corn in question was planted by O'Neil in May, 1891, and was growing at the time of the sale and confirmation. No lease was made by the plaintiff to O'Neil, but O'Neil continued in possession after the sale, and Monday made no effort to obtain possession, except that at different times during the summer of 1891 he notified O'Neil not to pay rent to Stanford, and that he would insist on either the rent or a portion of the crops. The question presented is therefore whether under the foregoing state of facts, Monday or O'Neil was the owner of the crops growing on the land, but not matured at the time the sale was confirmed.

Since the briefs were filed the cases of Yeazel v. White, 49 Neb. 432, 58 N. W. 1020, and Foss v. Marr, 40 Neb. 559, 59 N. W. 122, have been decided. Their effect is to limit the inquiry here to a much narrower field than that covered by the briefs. In Yeazel v. White it was decided that the owner of land sold upon execution retains the right of possession, and is entitled to the usufruct of such land until confirmation of the sale, and that, therefore, the judgment debtor is not accountable to the purchaser for hay cut upon the land after sale and before confirmation. In Foss v. Marr it was held that a mature crop of corn standing upon land sold at judicial sale, and not taken into account by the appraisers, did not pass to the purchaser, but remained the property of the mortgagor, who had planted and cultivated it. In the latter case some stress was laid upon the fact that the crop was matured, and the language of the supreme court of Iowa in Hecht v. Dettman, 56 Iowa, 679, 7 N. W. 495, and 10 N. W. 241, wherein a distinction is drawn between a growing crop and one already matured, but not severed, was quoted as confirming the conclusion reached. The language used in Hecht v. Dettman was, however, employed to distinguish that case from Downard v. Groff, 40 Iowa, 597, holding that the right to growing crops passes to the purchaser at a judicial sale. Downard v. Groff followed the general current of authority, and recognized that Cassilly v. Rhodes, 12 Ohio, 88, was opposed to the conclusion reached, stating truly that Cassilly v. Rhodes was based upon a construction of the Ohio appraisement law. Foss v. Marr was based upon the doctrine of Cassilly v. Rhodes, our appraisement law being similar to that of Ohio, and the reasons given by the Ohio court for departing from the general rule, because of the effect of the appraisement law, being deemed sound and applicable to this state. The court did not, in Foss v. Marr, undertake to decide that growing crops do pass to the purchaser. On the contrary, in the last paragraph of the opinion it is expressly stated that that question was neither presented nor decided. Cassilly v. Rhodes was a case where the crop involved was one which had not matured, and the language of the opinion refers to it throughout as a growing crop. The reason of the decision was that the value of the annual crops is not included in the appraisement made prior to the sale, and that the vendor's rights therein can be saved only by regarding such crops as personalty requiring a separate levy. This reasoning, which is approved in Foss v. Marr, is equally applicable to a growing crop as to one matured. In Houts v. Shawalter, 10 Ohio St. 125, Cassilly v. Rhodes was reaffirmed, and the crop there in controversy was also a growing crop.

It will be remembered that Monday, after he obtained title to the land, did not enter into possession thereof, but suffered O'Neil to remain in possession, merely notifying him that Monday would expect either rent or a portion of the crop; that is, he treated O'Neil as his tenant, demanding rent either in money or in kind. O'Neil's conduct is not sufficiently disclosed to establish whether or not there was an attornment by him to Monday. Assuming that there was not, it would seem that he was holding adversely; and, if so, it is not apparent how Monday could obtain the crop. If he were not holding adversely, then

his relationship to Monday would seem to be that of a tenant at will. At the common law, when a tenancy is uncertain, so that the tenant cannot know that his estate will terminate before the crop can ripen, the tenant is entitled to re-enter and harvest the crop at maturity. This is the law in this state. Sornberger v. Berggren, 20 Neb. 399, 30 N. W. 413; McKean v. Smoyer, 37 Neb. 694, 56 N. W. 492. Under this principle, it would seem clear that O'Neil was entitled to the crop.

In opposition to this view, it is argued that the foreclosure suit had been begun, and, indeed, a decree of foreclosure rendered, before the crop was planted, but we do not think this fact material. O'Neil knew, of course, that a sale might be made and confirmed before his crop would mature, but he could not know that such would be the case. We do not think that he was obliged to abandon the land, or permit it to lie uncultivated, merely because there was a possibility or a probability that his estate would be determined before the crop would mature. Public policy requires that the law should be so construed as to encourage, rather than discourage, the tillage of lands under such circumstances. The language of the supreme court of Ohio in Houts v. Shawalter, supra, is peculiarly applicable: "Under our system, frequent advertisements and offers of sale, and, occasionally, revaluations, are necessary, before a sale can be effected. When an appraisement is made, it cannot be foreseen when a sale will be effected. It is not for the interest of any party, nor for the public interest, that the land should thenceforth lie waste. Then there may have been no crop sown or planted, but, when the sale comes to be made, there may be growing crops put into the ground in the meantime." This language was used with reference to the period between appraisement and sale, but it applies with all the more force to the period between decree and sale. We are not determining in this case what the rights of the parties would be had Monday secured possession and evicted O'Neil before the crop matured. What we hold is that, following the reasoning in Cassilly v. Rhodes and Foss v. Marr, the tenant should be protected in his crop, unless before it is matured something happens to deprive him of the right thereto, and that, therefore, where the purchaser permits the tenant to remain in possession until the crop is harvested, the title thereto remains in the tenant, and does not pass to the purchaser. We have referred to O'Neil as the tenant, but what has been said is applicable to the mortgagor himself. We have treated O'Neil as if he were himself the mortgagor, because, without inquiry as to whether he would otherwise have any higher rights, having been made a defendant in the foreclosure suit, a decree having there been rendered barring his estate, it is clear that in this proceeding he stands in no better position than had he been the mortgagor instead of the mortgagor's tenant. Under the view of the law above presented, the plaintiff was not, under the stipulation, entitled to recover, and the peremptory instruction given by the trial court was correct. Judgment affirmed.

See Samson v. Rose, 65 N. Y. 411.

RICHARDS v. KNIGHT.

(42 N. W. 584, 78 Iowa, 69.)

Supreme Court of Iowa. June 3, 1889.

Appeal from district court, Carroll county; J. H. MACOMBER, Judge.

This is an action of replevin for a quantity of corn. There was a trial by jury, and a verdict and judgment for the defendant. Plaintiff appeals.

John Brown and *F. M. Powers*, for appellant. *Macomber & Son*, for appellee.

ROTHROCK, J. 1. It appears from the pleadings and evidence that the corn in question was raised upon certain land in Carroll county, in the year 1887. The land at one time belonged to one Trull, who mortgaged it to Jennie C. Richards, the plaintiff herein, to secure the payment of a debt. An action of foreclosure was had, and the land was sold to the plaintiff upon foreclosure, and a sheriff's deed was made and delivered to her on the 23d day of August, 1887. In the spring of that year the defendant leased part of the land of Trull, and planted it in corn. The corn was cultivated by the defendant, and on the 9th day of October, 1887, the plaintiff commenced this action, in which she claimed that the corn was her property, because the ownership thereof passed to her with the title to the land at the date of the conveyance to her on the said 23d day of August. It was held in Hecht v. Dettman, 56 Iowa, 677, 7 N. W. Rep. 495, 10 N. W. Rep. 241, that, as between the purchaser of land at a foreclosure sale and a tenant of the mortgagor, the latter is entitled to crops grown by him which are matured at the time the sheriff's deed is executed, though not yet severed from the land. This case was followed and approved in Everingham v. Braden, 58 Iowa, 133, 12 N. W. Rep. 142, and it was therein further held that the tenant's title to the crop was not affected by the foreclosure until the execution and delivery of the sheriff's deed, although the purchaser at the sheriff's sale was entitled to the deed before it was actually made. The question presented to the jury for its determination in this case was whether the corn in controversy was matured on the 23d day of August, 1887. On this question farmers who had seen the corn were called as witnesses from all the country round, and there was a well-defined conflict in their testimony on the question. It is unnecessary to repeat the evidence here. It is sufficient to say that the jury was warranted in finding that the corn was planted in April; that it was a remarkably early season; and that at the time named it was fully matured, and no longer demanded nurture from the soil.

2. In the course of the examination of the witnesses, objections were made to certain questions, and answers thereto, and rulings made upon the objections by the court of which the plaintiff complains. One witness was asked this question: "Don't farmers consider corn mature when it is fit to cut up?" Another was asked: "You may state to the jury whether or not you consider the corn mature at that time." Objections to these questions were overruled. We do not think it necessary to set out the numerous other objections which were made. We have given these as a sample for the purpose of showing that they were all without prejudice to the appellant. The argument upon the two objections above cited is that the question was, not what was considered by farmers, but what the fact was as to the maturity of the crop. It is apparent that there should be no reversal on account of these rulings. The use of the word "consider" neither misled the jury nor the witnesses. In the connection in which the word occurs in the questions it is used as synonymous with "thought" or "believed," and is not objectionable. We discover no error in the conduct of the trial, upon rulings as to the admission and exclusion of evidence.

3. The corn in question was taken by the sheriff upon the writ of replevin. The plaintiff filed an amendment to the petition, in which it was averred, in substance, that after the corn was taken by the officer the defendant, Knight, consented that it be sold to one Armstrong for $90, the price being 25 cents a bushel, and that there were 360 bushels, and that defendant is now estopped from asserting that there were more than 360 bushels, or that it was worth more than 25 cents per bushel. The plaintiff complains because the court did not instruct the jury upon the effect of this alleged agreement. There was no necessity for such instructions, and it would have been improper to have given them, because there was no evidence that the corn was sold to Armstrong by virtue of an agreement between the parties. The only evidence upon that question is that the sheriff sold the corn to Armstrong at an underestimate of the quantity, and that when Armstrong ascertained that he had bought it for less than it was worth he paid the defendant $25 as a gratuity.

4. The plaintiff requested the court to give to the jury the following instruction: "Where a tenant plants a crop which he knows he cannot reap before his landlord's rights cease and the equity of redemption expires, and the land passes to a sheriff's deed, he does so at his peril, and cannot be heard to complain." The instruction was refused, and plaintiff excepted, and assigns the ruling as error. It may be that this instruction is correct, as an abstract proposition. But it was not erroneous to refuse to give it to the jury. There is no evidence that the defendant knew that the plaintiff would take her deed before the crop matured, and whether she did so was the very question submitted to the jury. It was conceded all through the trial, and the court instructed the jury, that, if the crop was not matured when the deed was delivered, the plaintiff was the owner, and entitled to a verdict.

5. One ground in the motion for new trial was the alleged misconduct of appellee's counsel in offering to introduce improper evidence to the jury, and in making the offer in the presence and hearing of the jury. It is claimed that the motion should have been sustained on this ground. The showing made by appellee's counsel as to what occurred on the trial is a complete exoneration from the charge of improper conduct, and the motion was rightfully overruled, so far as this ground is involved.

6. Appellant filed a motion to strike appellee's abstract and a supplement thereto from the files, because the abstract does not purport to be an abstract of all the evidence, nor does it purport to be an addition to appellant's abstract, and because the supplement to the abstract was not filed within proper time. The motion will be overruled. The appellant was in no manner prejudiced by the failure to file the supplemental abstract in proper time. It was merely a correction of appellee's abstract in the respects in which appellant claims it was deficient. Upon a full consideration of the whole record, we discover no good reason for disturbing the judgment. Affirmed.

KIPLINGER v. GREEN.

(28 N. W. 121, 61 Mich. 340.)

Supreme Court of Michigan. May 6, 1886.

Error to Eaton.

Van Zile & Fox, for appellant. Huggett & Smith, for appellee.

MORSE, J. The plaintiff in this action, on the fifteenth day of September, 1883, entered into the following agreement with the defendant: "This agreement, made and entered into this fifteenth day of September, 1883, between Alonzo Green, of the city of Charlotte, county of Eaton, and state of Michigan, of the first part, and Jonas Kiplinger, of the second part, witnesseth, that said second party hereby agrees to move onto and cultivate and farm the said first party's farm, where he now resides, lying in the town of Eaton, and city of Charlotte, in said county, for the term of five years and five months from the first day of November, 1883, on the following terms, viz.: Said second party is to do, or cause to be done, all the work, furnish all the teams and implements necessary in so farming the premises, and is to furnish one-half of all the seed to be sowed or planted; and deliver one-half of all grain raised on said farm to said first party, in the granary on said farm, and one-half of the potatoes and vegetables that shall be raised, after they are dug, on said farm, as said first party may direct. Said first party is to furnish one-half of the seed for all such crops. Said first party is also to have one-half of all the hay, straw, and cornstalks, after they are properly cut and secured by said second party, as the first party may direct. Each party is to have one-half of the apples, and pick or gather the same. Said first party is to have all the cherries and grapes he wishes, that may grow on said farm. Each party is to have one-half of the pasture, also to furnish an equal amount of poultry, and share equally in its products. Said second party is to have a good garden, and divide the same as the other products of the farm. Said second party is to pay all the highway taxes on said farm, and is to keep in repair all the fences, and make such new fences as may be necessary on said farm, said first party furnishing the materials to repair and make the same; also to keep in repair all buildings occupied by him, and the wind-mill on said farm; and to have the use of all the dwelling-house on said farm, except the chambers, hall, and parlor of the upright brick house, which shall be exclusively said first party's; also such portions of the cellar as he may desire to use. Said second party is also to use what barn room, stabling, and granary that is necessary to accommodate his farming work. All horses and other stock belonging wholly to said second party is to be fed from said second party's share of the products of said farm, or that which he may purchase. All sheep or other stock or poultry owned by both parties shall be taken care of by said second party, and fed from the products belonging to both parties. Said second party is to milk the cow or cows of said first party, and let him have all the milk he wants to use for his family, and the rest to make into butter for said first party's family use. Said second party is to have all the fire-wood necessary for his use, from said farm, and from the 80 acres, in the town of Carmel, belonging to said first party, as he, said first party, may direct. Such pieces of land as are now let on said farm to other persons are excepted until their lease expires, and then said second party is to farm such pieces. Said second party is to feed and care for the undivided sheep and cows of said first party, the coming winter, from the hay and other feed owned by said first party. It is expressly understood and agreed that said first party is to remain in full possession, and have full control, of said farm, and all that pertains to it, and have full directions as to how all and what crops shall be raised on it by said second party. All of said farming shall be done in a good, thorough, workman-like manner by said second party. Upon the non-performance of any of the above specifications this agreement shall immediately become null and void. Both of said parties hereby agree to all of the above mentioned specifications. Alonzo Green. Jonas Kiplinger." Under this agreement the plaintiff moved upon the farm about the twenty-third day of October, 1883, and the following summer put in a crop of wheat. In September, 1884, he served the following notice upon the defendant: "Charlotte, Mich., September 30, 1884. Mr. Alonzo Green, Esq.—Dear Sir: You are hereby notified, and duly informed, that I shall vacate the premises and farm on which I now reside, the same belonging to you, on the first day of April, A. D. 1885, for the following reasons: (1) Owing to the unreasonableness of the contract framed by you, which I now find, and am aware, is contrary to all farming customs of the county and vicinity. (2) On account of the deception and fraud practiced by you in framing said contract, material parts of which you failed to read to me, and which I was not aware it contained. Yours, Jonas Kiplinger,"—and moved off from the premises the second day of April, 1885. He testified that after the service of the notice he spoke to the defendant once, and told him that if he would give him a better chance than he had under the contract he would stay on, but gave him to understand that he would not stay there unless better terms were given him. The defendant let a portion of the premises to another tenant, who moved upon the same the day before the plaintiff left. The plaintiff testified, however, that he left the place in pursuance of the intention manifested in his notice, and because he found he could not stand the bargain contained in the contract. The plaintiff undertook to harvest the wheat put in by him the

summer before, but was prevented from doing so by the defendant, who gathered the same. He made a written demand upon the defendant for it, and brought replevin. Upon the conclusion of the plaintiff's case, showing these facts, the counsel for the defendant, upon the trial, moved to strike out the evidence introduced in plaintiff's behalf as insufficient to warrant a recovery, which the court did, and thereupon directed the jury to find a verdict for defendant.

The plaintiff's counsel contends that this was error, and that upon the facts shown the plaintiff was entitled to recover for one-half the wheat; that the agreement between the parties was not a lease, but a contract to crop the land on shares; that the relation of landlord and tenant did not exist; that the parties were tenants in common in the wheat; and by the action of the defendant in cutting and threshing the same, and refusing to account for any of it to plaintiff, he was guilty of a conversion of plaintiff's share, for which plaintiff was entitled to bring replevin. He insists that the abandonment of the contract and the farm cuts no figure in the case, as plaintiff's interest in the crop vested as soon as the same was sown; that it became personal property, and he might have sold his share before he left the place, and the purchaser obtained a valid title thereto.

We find no error in the action of the circuit court. It can make no difference in the law applicable to the facts in this case what was the particular name or nature of the plaintiff's holding under this agreement. His rights must be gathered from the contract, and considered in relation to its terms. Whether it be called a lease or a mere cropping agreement, its construction and its effect, as far as the plaintiff's claim to this crop of wheat is concerned, must be the same. He went upon the farm and put in the wheat under and by virtue of this instrument, and whatever rights he can legally claim must accrue from and rest upon its provisions; and his counsel upon the trial in the court below expressly stated that he based his right to recover upon the contract, and his acts under it. When he voluntarily abandoned the farm, and forfeited the contract under his notice, he could no longer claim any rights under it. He admits that, after serving the notice, he did nothing upon the farm except to care for the stock upon it. There is no theory of the law under which the plaintiff could recover one-half of this crop under a contract which he had, upon his own motion, repudiated. If so, he might have abandoned the farm, and thrown up the contract the next day after the wheat was sown, and held his share. If, before his surrender of the agreement and the possession of the farm under it, he had sold his share of the crop to another, purchasing in good faith, such assignee of his interest would have been entitled to reap and harvest the wheat under this agreement, because of equities which the plaintiff cannot assert after his rescission of the contract, the crop being considered while the agreement is in force as personal property, subject to sale or levy as such. But when the plaintiff abandoned the premises, and surrendered the contract, the wheat became a part of the land, and went with it. Chandler v. Thurston, 10 Pick. 205; Carpenter v. Jones, 63 Ill. 517.

The doctrine of emblements does not apply. The term of the plaintiff's occupancy of the premises was certain and definite under the contract. It was not determined by the act of the defendant, nor by any other cause than the violation by the plaintiff of the agreement under which he held. He cannot profit by his own wrong.

The judgment of the court below is affirmed, with costs.

(The other justices concurred.)

See Dorsett v. Gray, 98 Ind. 273.

CARNEY v. MOSHER et al.

(56 N. W. 935, 97 Mich. 554.)

Supreme Court of Michigan. Nov. 24, 1893.

Error to circuit court, Hillsdale county; Victor H. Lane, Judge.

Action of trover by Darwin H. Carney against Orrin B. Mosher, Thomas J. Lowry, Lucien Walworth, and Henry S. Walworth, for the conversion of certain wheat. There was a judgment entered on the verdict of a jury directed by the court in favor of defendants, and plaintiff brings error. Affirmed.

Geo. A. Knickerbocker and Wm. C. Chadwick, for appellant. C. A. Shepard and St. John & Lyon, for appellees.

MONTGOMERY, J. The plaintiff brought trover for wheat grown upon land owned by defendant Orrin B. Mosher. The wheat was sown by Alvin L. Mosher while occupying the land as the tenant of Orrin B. The wheat was harvested by defendant Mosher, and sold to defendant Henry S. Walworth, who, it is claimed, had notice of plaintiff's rights. Prior to the spring of 1890, Alvin L. Mosher had occupied the land under a written lease, and in the spring of that year renewed his lease for one year by oral agreement. There had been a previous lease, and, as the testimony of plaintiff shows, on the occasion of the present letting, Alvin refused to pay the rent previously reserved, unless he should have the privilege of putting the land all into wheat, and it was agreed that he might do so. He proceeded to sow the land to wheat, and in January, 1891, sold the growing crop to plaintiff. In the spring, Alvin surrendered possession to Orrin B., who proceeded to reap the crop, after notice of plaintiff's purchase. The circuit judge directed a verdict for defendants on the ground that the lease was oral, and that the implied provision that the lessee should have the right to reap the crop of wheat was void, under the statute of frauds. The defendants contend that this holding should be sustained; and, further, as it appears that the rent was not paid during the year, nor since, that the lessee had no right to the crop, and that a purchaser would have no greater right than he; and, further, that if it be conceded that the purchaser of the crop of a tenant would not, in general, be affected by a subsequent default of the tenant, the present case is an exception to the rule, for the reason, as it is contended, that the transfer from Alvin Mosher to plaintiff was for the purpose of defrauding the defendant Orrin B. out of the rent. It is, however, a sufficient answer to this last contention that the fraud is not admitted, nor to be deduced as a legal consequence from conceded facts. It would therefore be a question for the jury, by the express terms of the statute. Section 6206, How. St.

If it be assumed that the tenant was in possession by right, and under a lease which gave him the right to reap the crop, as well as to sow, it follows that inasmuch as he sold the crop before any default on his part, so far as appears, and certainly before forfeiture, the purchaser from him obtained a title which could not be defeated by the lessee's subsequent default. This is the rule established in this state by Nye v. Patterson, 35 Mich. 413, and Miller v. Havens, 51 Mich. 482, 16 N. W. Rep. 865. See, also, Dayton v. Vandoozer, 39 Mich. 749. The question for our determination, therefore, is the one upon which the case was decided below, namely, did the parol lease for one year, with the agreement that the tenant might sow the land to wheat, give him a right to enter after the expiration of his lease, and reap the crop? On the part of the defendants, it is contended that the right claimed is in the nature of an interest in land, and that to sustain the right to reap the crop would be, in effect, extending the lease into the second year, and that said contract is therefore void, under the statute of frauds. On the other hand, it is contended that the lease terminated, according to its terms, at the end of one year, and that the right to enter in and reap the crop is one growing out of the nature of the previous lease, which has expired. It is very evident that, whatever the right to enter and reap the crop be called, it was a right which could not be exercised within one year. We think it is equally evident that it was an interest in land. The exclusive use of the land was required during three months after the end of a year from the letting, before the crop would ripen. That this was a burden upon the estate in the land is too plain for argument. It was held to be an interest in the land in Reeder v. Sayre, 70 N. Y. 183. In the present case, the lessee was in possession at the time of entering into the contract, and continued in possession under the void lease. This constituted him a tenant at will, under our holdings. See Huyser v. Chase, 13 Mich. 98. The tenancy could be terminated by either party on three months' notice to quit. The tenant did not wait for this, but left the premises in January or February, 1891. He paid no rent. The owner thereupon took possession, as he had a right to do, and as he could, but for the lessee's peaceable surrender, have done by a notice to quit. If it be suggested that treating the lease as void, under the statute of frauds, the tenant should, because of his previous relations, be treated as a tenant from year to year, he stands in no better situation, for the year would be terminated, under such holding, March 31, 1891, giving the owner the right to possession thereafter, and the right to reap the crop. The judgment will be affirmed, with costs. The other justices concurred.

MICHIGAN MUT. LIFE INS. CO. v. CRONK.

(52 N. W. 1035, 93 Mich. 49.)

Supreme Court of Michigan. July 28, 1892.

Error to circuit court, St. Clair county; Arthur L. Canfield, Judge.

Replevin by the Michigan Mutual Life Insurance Company against Edward Cronk. Judgment for plaintiff, and defendant brings error. Affirmed

Frank Whipple, for appellant. Phillips & Jenks, for appellee.

MONTGOMERY, J. The defendant, on the 18th day of June, 1887, contracted in writing to purchase of one William L. Jenks the N. W. ¼ of the S. W. ¼ of section 19, township 7 N., range 16 E. The contract was in the usual printed form, and contained a covenant on the part of the defendant that he would not commit, or suffer any other person to commit, any waste or damage to said lands or buildings, except for firewood or otherwise, for home use, while clearing off the lands in the ordinary manner. Immediately after entering upon the lands he erected a small dwelling house thereon, and lived in it for two years. He then made default in his payments, and the plaintiff, to whom the contract had in the mean time been assigned by Jenks, terminated the contract, and required the defendant to surrender possession. The house was a one-story frame house, 20 by 26, and suitable for the purposes of a dwelling house to be used upon the land in question. After the removal of the house from the premises, it was placed upon a 40 across the street, and plaintiff, after demand, brought replevin. The circuit judge directed a verdict for the plaintiff, and the defendant appeals.

Two questions only are presented in appellant's brief. It is first claimed that replevin will not lie, because the house had become a fixture upon the land to which it was moved, and was therefore real estate; second, that, as the house was occupied as a homestead by the defendant and his family, the wife was a necessary party. We think that when this house was erected upon the land held under contract it became a part of the realty, and as such the property of the owner of the land, subject only to the rights of the purchaser therein. Kingsley v. McFarland (Me.) 19 Atl. 442; Milton v. Colby, 5 Metc. (Mass.) 78; Iron Co. v. Black, 70 Me. 473; Tyler, Fixt. 78. It being severed from the land, it became personal property, and replevin would lie unless it became affixed to the realty by the tortious act of the defendant in removing it and placing it upon other lands. But we think no such legal effect can be given to the defendant's wrong. The house was moved upon land of a third party. There was no privity of title between the ownership of the house and the ownership of the land to which it was removed. The cases cited by defendant of Morrison v. Berry, 42 Mich. 389, 4 N. W. 731, and Wagar v. Briscoe, 38 Mich. 587, do not apply. The house remaining personal property in the wrongful possession of defendant, it follows that no homestead right, which consists in an interest in lands, attached.

The judgment is affirmed, with costs. The other justices concurred.

SMITH v. BLAKE.

(55 N. W. 978, 96 Mich. 542.)

Supreme Court of Michigan. July 26, 1893.

Appeal from circuit court, Cheboygan county, in chancery; C. J. Pailthorp, Judge.

Action by Sarah I. Smith against Henry A. Blake to enjoin the removal of certain machinery from a foundry of which plaintiff is the mortgagee and purchaser at foreclosure sale. From a decree for plaintiff, defendant appeals. Affirmed.

George E. Frost, (Oscar ' lams, of counsel,) for appellant. Henry W. MacArthur, (George W. Bell, of counsel,) for appellee.

HOOKER, C. J. Complainant is the owner of a mortgage upon certain premises in the city of Cheboygan, used as a foundry, machine shop, and blacksmith shop. This mortgage was made December 14, 1882, for $2,000, with interest at 8 per cent., and was foreclosed by advertisement, the premises being bid in for $2,402.61 by the complainant, who (the bill states) will become entitled to a sheriff's deed upon July 3, 1892, at which time her investment will amount to $2,594.82. The bill is filed to restrain the defendant from removing certain machinery upon the premises, viz.: One iron planer; one upright power drill; one shaper; three iron lathes; one wood lathe; one upright engine; one horizontal boiler; one band saw and frame; one rip saw and frame; one foundry cupola furnace and blower; the belting, shafting, pulleys, and boxes necessary for the running and management of the above machinery.

It is contended that the bill must be dismissed under the demurrer clause in the answer, for the following reasons, viz.: (1) The bill does not allege that the articles named are fixtures; (2) that it fails to show any claim of the property in controversy by the defendant, or threat of removal; (3) that no injunction can properly issue upon information and belief. Had a demurrer been filed, these objections would have been fatal. But the law does not favor the raising of technical questions after hearing upon the merits, and will not permit the dismissal of a bill upon a demurrer clause in the answer unless the bill is fatally defective, and past remedy by amendment. Barton v. Gray, 48 Mich. 164, 12 N. W. Rep. 30; Bauman v. Bean, 57 Mich. 1, 23 N. W. Rep. 451; Lamb v. Jeffrey, 41 Mich. 720, 3 N. W. Rep. 204. The bill impliedly states that these articles are part of the realty. When we read this sixth clause in the light of the whole bill, no other inference can be drawn. The failure to allege threats could have been the subject of amendment in the court below, and probably would have been had any one considered it necessary. Threats were not even proved, but, as defendant's answer claimed this property to be personalty, not covered by the mortgage, and this question was all that was litigated, we may consider the intention to remove admitted. This brings us to the merits of the case. The proof shows that all of these articles were placed in a building erected many years ago for a foundry and machine shop by the owner of both, and, while some of the machines were not fastened to the soil or building, they were heavy, and it was unnecessary. All were adapted to the business for which the building was erected. Furthermore, the preponderance of the proof shows that the parties understood that this property was to be covered by the mortgage. We think the decision of the circuit court in holding that the mortgage covered these articles was in accord with the Michigan authorities.

A point is made that an injunction cannot properly be granted when the bill fails to allege the requisite facts upon the oath of the complainant. That is true where the injunction sought is preliminary, but we see no reason why relief by injunction cannot be based upon proof presented upon the hearing. In this case, while the injunction should not have been allowed, it was permitted to stand until the hearing, and, "sufficient equity appearing," it should be perpetuated. Clark v. Young, 2 B. Mon. 57. The record may be remanded, with directions that complainant be allowed to amend her bill, whereupon the decree may stand affirmed. Complainant will recover costs of both courts. The other justices concurred.

ALDINE MANUF'G CO. v. BARNARD.

(48 N. W. 280, 84 Mich. 632.)

Supreme Court of Michigan. Feb. 27, 1891.

Appeal from circuit court, Kent county; William E. Grove, Judge.

M. H. Walker, for appellant. More & Wilson, for appellee.

LONG, J. This cause was tried in the Kent circuit court without a jury, and the court found the following facts and conclusions of law:

"First. On the 21st day of October, A. D. 1887, plaintiff sold to defendant a bill of Aldine grates, mantels, and hearths, to be placed in a block of tenement-houses, owned by defendant in the city of Grand Rapids. This bill of goods includes three No. 18 grates. No time was given or asked on said bill, and on November 1, 1887, defendant paid one hundred dollars by check generally upon said bill, and it was so applied.

"Second. In February, 1889, plaintiff brought suit in assumpsit against defendant in justice's court, to recover the balance due on the bill, and declared on the common counts only, filing the following bill of particulars as its only claim:

Grand Rapids, Mich., February 27th, 1889. Bertram W. Barnard in account with Aldine Manufacturing Company.

1887.			
Oct. 21.	To 3 No. 18 Aldine fireplaces	$200	
	To 1 No. 22 Aldine fireplace		
	To 4 mantels		
	To 4 tile hearths		
	To 11 hours springing arches		5 00
	To sand 25c; cement $1...		5 00
	To ½ barrel calc. plaster..		1 10
	To fire clay		20
	To four hours tearing out Bissel grate from house.		2 00
	To mason and tender setting No. 22 grate in house		4 00
			$214 05
1887.			
Nov. 1st.	By cash.....		100 00
			$114 05
	To 1 yr. 4 months inst. at 6 p. c.....		9 12
	Balance		$123 17

"This suit resulted in a judgment of no cause of action, and an appeal was taken from such judgment to the circuit court for the county of Kent. Said cause came on for trial on the 8th day of June, 1889, before me and a jury. A copy of defendant's plea and notice under the plea in said cause is hereto attached marked 'Exhibit A.' On the trial of said cause defendant testified he had paid in full for said bill of goods, except said 3 No. 18 grates. It was admitted by plaintiff that if the jury should find that on the sale of said grates plaintiff warranted them as claimed by defendant in his testimony, plaintiff could not recover for said 3 No. 18 grates, plaintiff then and there admitted that said grates would not fulfill the warranty as claimed by the defendant, and, upon said admission being made by plaintiff, the court ruled that the evidence should be confined to the question of whether the warranty testified to by defendant was in fact made; and the defendant, having tendered $18.02 as the amount admitted to be due, he could not recover any judgment for damages against plaintiff under his plea of recoupment. Defendant thereafter testified that before the commencement of suit he had ordered plaintiff to remove said grates for the reason that they were worthless, and would not work, and that defendant would not pay for them, to which plaintiff's manager and secretary replied that he would not do it; the grates were all right; and that defendant would have to pay for them. Said cause was tried and submitted to the jury on the theory that if the warranty which defendant claimed was made when the grates were sold was in fact made plaintiff could not recover, and that defendant could not recover damages on account of breach of said warranty for the reason that his tender of the amount admitted to be due plaintiff would prevent such recovery. The court charged the jury as follows: 'Gentlemen of the jury: There is but a single question of fact for you to determine in order to dispose of this case. The sale of the goods and delivery and the price are undisputed. The defendant claims that the sale was accompanied by an express warranty that the grates would do the work of heating the rooms; that one grate would do the work of heating one suite of rooms. The plaintiff claims that no such warranty was given, but, upon the contrary, he stated, as he claims, to the defendant, at the time the selection of the grates was made, that he ought to take the larger size, as they would give better satisfaction. You have heard the testimony. Now, one of these claims is true, and the other is not. It was conceded on the trial that if you should find that the warranty which the defendant claims was made was in fact made, the plaintiff has no right of action. Therefore all there is of the case, gentlemen, is for you to determine whether or not that warranty which the defendant relies on was made or not,—the warranty that the grates would do the work of heating the rooms. If you find that the warranty was made as claimed by the defendant, your verdict will be "No cause of action;" if you find that it was not made, your verdict will be for the plaintiff for the amount of his claim, so far as it is proved by the evidence. I think there is no claim but that it is proved, with the exception of the $2.30; and I suppose you would concede, Mr. Walker, the plaintiff is entitled to recover $104.56. Mr. Walker. I don't dispute the amount. The Court. Then if you find for the plaintiff your verdict will be for the plaintiff, and you are to assess his damages at $104.56. If you find for the defendant your verdict will be, "No cause of action."

Mr. Walker. You have used the term "warranty" all through. I would like to have it stated what the defendant testifies to constitute a warranty. The Court. If you find that the agent, Mr. Phillips, assured the defendant—stated to him—that one of these grates would do the work of heating one of these suites of rooms, that would constitute a warranty. Swear an officer.' Under the instruction of the court said jury rendered a verdict of no cause of action, and judgment was entered accordingly, which judgment has never been appealed from or vacated.

"Third. After the termination of said suit plaintiff, by its manager, James T. Phillips, demanded from defendant said three grates. Defendant said in reply that he would refer the matter to Myron H. Walker, his attorney; and soon after plaintiff received a letter from said Walker, refusing, on behalf of defendant, to allow plaintiff to remove said grates, which letter is as follows: 'Grand Rapids, Mich., 6-21, 1889. The Aldine M'f'g Co., City—Gent'n: Regarding your request for leave to take out and take away the Aldine grates in Mr. Barnard's house, I have to say that I find no authority of law or foundation of right for such action. These grates were sold unconditionally, on what the jury has determined was a false warranty, and by your own act were solidly built into the chimneys of Mr. Barnard's house, and have thereby become fixed parts of the house and the real estate, and could not be removed without great damage to the house. I fail, under these circumstances, to see what right you acquire to remove them simply because your warranty has been proved and found to be false, and Mr. Barnard's damages to be at least as great as the balance claimed on your account, so that you were found to have already received your full pay. I cannot comply with your request, and, furthermore, I notify you that you will be held strictly accountable for all damages occasioned by any attempt to remove them. Very resp'y, M. H. Walker.' Afterwards, and on the 25th day of June, 1889, said Phillips, on behalf of plaintiff, made demand upon defendant in the following language: 'You have in your block of houses on the corner of Court and Allen streets in the city of Grand Rapids, Michigan, three No. 18 Aldine fire-places or grates. The Aldine Manufacturing Co., of said city of Grand Rapids, is the owner of said three grates, and entitled to the possession thereof. In behalf of said company I hereby demand said grates, and that said company be allowed to remove said grates from said houses. On the part of said company I undertake, if this demand be granted by you, to remove said grates in a reasonable and careful manner, and at such time as shall best suit the convenience of yourself and the occupants of said houses, and to remove said grates without injury to the mantels or hearths or any other property of yourself or tenants.' Said demand was in writing, but unsigned, and was read to, but not left with, said defendant. Defendant refused to grant this demand, and refused to allow plaintiff to remove said grates. I further find that prior to the commencement of this suit defendant had converted said three grates—the property of said plaintiff—to his own use.

"Fourth. Afterwards this suit was commenced in assumpsit by plaintiff before Thomas Walsh, justice of the peace, for the value of the grates. Judgment was rendered for plaintiff for one hundred dollars damages, and defendant appealed.

"Fifth. I find that said three grates were worth at the time demand was made as aforesaid the sum of eighty-five dollars, and that interest on said sum to date amounts to $2.50.

"Sixth. I further find that the whole bill of parcels, to-wit, 1 No. 22 Aldine fire-place, 3 No. 18 Aldine fire-places, 4 tile hearths, and 4 mantels, mentioned in plaintiff's bill of particulars in said first suit, were all included and sold by the terms of the original contract of sale for the single price of $200 for the whole lot, which also included the setting of the same in defendant's block, and that said setting was in fact done by plaintiff and its agents at its own expense. I further find that said grates are so placed that they can be removed without material injury to defendant's property, and that when said grates were placed in defendant's house they did not become fixtures or a part of the real estate.

"Conclusions of law. First. At the termination of the first suit brought by plaintiff against defendant, resulting in a judgment of no cause of action, the title to said three Aldine grates was in plaintiff, and plaintiff was entitled to possession of the same.

"Second. After demand and refusal to deliver up the grates, plaintiff was entitled to maintain this action against defendant for the value of said grates. Plaintiff is therefore entitled to judgment for eighty-seven and 50-100 dollars, the value of the grates at the time the demand was made, with interest and cost of suit."

Judgment was entered accordingly.

Exceptions were alleged to these findings of fact and conclusions of law. It is insisted here (1) that upon the facts found the grates became fixtures; (2) that the evidence does not sustain the findings that the grates did not become fixtures; (3) that the former suit is a bar to this action; (4) that under the circumstances stated upon this record plaintiff could not waive the tort and maintain an action of assumpsit.

From a careful examination of the record we are all agreed that the evidence supports the finding that the grates did not become fixtures, and the court properly so found. The grates were sold, with other goods, as one parcel, and at an agreed price; but the grates were warranted to heat the

rooms for which they were intended. The defendant paid for all the goods except the grates, and refused to pay for them because they did not fulfill the warranty. After receiving the goods he paid $100, and, when payment was demanded, he tendered to the plaintiff $18.02, balance unpaid on the goods except the grates, for which he refused to pay, and ordered the plaintiff to remove them. At this time he made no question but that the grates could properly be removed and desired the plaintiff to do so, and made no claim that they were fixtures. The plaintiff denied that any such warranty was made, and therefore refused to take the grates. It is quite remarkable that during the whole controversy arising out of the first suit the defendant nor his counsel made any claim that the grates could not be removed without injury to the building, but, on the contrary, the defendant was demanding that they should be removed by the plaintiff. This question was never raised until after the termination of that suit, and even when demand was thereafter made the defendant made no such claim, but in reply to the demand stated that he would refer the matter to his attorney. It was then discovered by his attorney for the first time in the history of the case that the grates had become fixtures, and for that, among other, reasons the plaintiff could not have satisfaction for the property which defendant had of the plaintiff, and for which not one dollar had been paid. Taking these facts into consideration, as well as the manner in which the grates had been put in, it is quite evident that the defendant never intended to retain them until he was advised by his counsel that plaintiff could not, as matter of law, take them out without injury to the freehold, and that plaintiff was barred from taking them by the result of the former suit. It is true that there is no universal test whereby the character of what is claimed to be a fixture can be determined in the abstract; that neither the mode of annexation nor the manner of use is in all cases conclusive; yet these considerations are frequently of much importance in arriving at the intention of the parties, which is the real test. It is now well settled in this state that whether an article attached to the freehold becomes a fixture depends largely upon the intention of the parties. Crippen v. Morrison, 13 Mich. 23; Robertson v. Corsett, 39 Mich. 777; Wheeler v. Bedell, 40 Mich. 693; Ferris v. Quimby, 41 Mich. 202, 2 N. W. 9; Manwaring v. Jenison, 61 Mich. 117, 27 N. W. 899; Stevens v. Rose, 69 Mich. 259, 37 N. W. 205. Under the finding of the jury in the first proceeding the grates were sold under an express warranty. It was conceded on that trial that they did not fulfill it, and the defendant testified that he ordered the plaintiff to take them out, which was not denied. It is therefore a legitimate conclusion, and the only sensible conclusion which can be arrived at under these circumstances, that the sale was a conditional one, dependent upon the fact whether the grates would heat the rooms, which it is conceded they would not do. Thus it clearly appears that the parties did not intend to make them fixtures, and this, coupled with the manner of their being affixed, must settle, and did settle in the mind of the trial court, the fact that they were not fixtures. We see no error in this finding. The court below was equally right upon the question of the former suit not being a bar. The former suit was in assumpsit for the value of the goods sold, the bill of particulars of which is set out in the findings of the trial court. On that trial the defendant testified that he had paid in full for all the goods except the grates. The controversy was thus narrowed to the right of recovery for those. It was claimed on the part of the defendant that they were purchased under a warranty that they would heat the rooms. This the plaintiff denied, but admitted they did not fulfill the warranty if one was made. Upon this admission the court ruled that the evidence should be confined to the question whether the warranty testified to by defendant was in fact made, and that the defendant, having tendered $18.02 as the amount admitted to be due, he could not recover any judgment for damages against plaintiff under his plea of recoupment. The cause was submitted to the jury upon the one question of whether a warranty was in fact made, and by their verdict they found it was made, and gave judgment of no cause of action.

Defendant's counsel now insists that this action and the proceedings taken were in affirmance of the contract, and therefore all the questions were there settled which are now sought to be raised in the present suit. It appears, however, that on that trial the defendant testified that he not only tendered the amount claimed for the balance of the bill aside from the grates, but had made a demand upon the plaintiff to remove the grates. Defendant then gave no evidence, and, so far as this record shows, offered none to show the amount of his damages, if any had been sustained; and he appears to have taken no exception to the ruling of the court that he could not recover judgment against the plaintiff on account of having made the tender. It is evident from the record presented here that in the controversy in the former suit the whole case was treated as a rescission of sale. The plaintiff's admission is evidence that he so viewed the case, and the court, from the rulings made on the trial, apparently regarded the case as one of rescission. There is no other theory upon which the defendant had a right to defeat the plaintiff's claim under the admissions made and the ruling of the trial court. If the defendant claimed upon that trial that he had a right to keep the grates and recover his damages, then it must be presumed the trial court would not have sub-

mitted the case to the jury without some proof of damages; but none was made, and the trial court adjudged it not necessary to the case as presented. Upon what theory could it be said that the damages, none having been proved, amounted to exactly the value of the grates? And yet, if the theory of defendant's counsel is adopted here, we are to hold that the trial court and the attorneys of the parties so regarded it, and that the plaintiff's admission upon that trial amounted to a concession that such was the fact. We cannot agree to such a proposition. The admission of the plaintiff cannot be so enlarged, and if it were so intended it would be a reflection upon the judgment and intelligence of the court and counsel trying that case. If the case was tried upon the theory that the defendant had the right to rescind by reason of the breach of the warranty, and had tendered the grates back to the plaintiff for that reason, then the whole course of the trial and the ruling of the trial court in this case are easily explainable. We are satisfied that this was the theory upon which the cause was tried. That cause was not, therefore, a bar to the present action, as the title to the grates had never passed to the defendant, and did not pass by reason of any action taken by the plaintiff upon the trial. It is also contended that the plaintiff had no right to waive the tort and sue in assumpsit. There is nothing in this point. It was personal property in the hands of the defendant, to which the plaintiff was lawfully entitled. He demanded it, and defendant refused to surrender the possession. The action was commenced in trover, and by stipulation of the parties the form of the action was changed to assumpsit. The possession of the property was obtained under contract between the parties, and the refusal to surrender upon demand amounted to a conversion for which the tort could be waived and assumpsit brought. Tuttle v. Campbell, 74 Mich. 652, 42 N. W. 384. The action could be maintained on the common counts (McLaughlin v. Salley, 46 Mich. 219, 9 N. W. 256), even though the declaration does not set forth the waiver of the tort (McDonald v. McDonald, 67 Mich. 122, 34 N. W. 276). We find no error in the record. The judgment must be affirmed, with costs. The other justices concurred.

See Conrad v. Mining Co., 54 Mich. 249, 20 N. W. 39.

MANWARING v. JENISON.

(27 N. W. 899, 61 Mich. 117.)

Supreme Court of Michigan. April 29, 1886.

Error to Kent.

Godwin & Earle, for plaintiff. J. C. Fitz Gerald, for defendant and appellant.

MORSE, J. The plaintiff brought suit against the defendant, declaring in two counts,—one in trover for the conversion of two steam-boilers, one smoke-stack, one steam-engine, one stave-cutting machine, and one machine for dressing and circling heading, and the other in trespass for taking and carrying away the same property. The case was tried before the court without a jury. The court found the facts to be, in substance, as follows:

(1) On the twenty-eighth day of December, 1873, and for some years prior thereto, the firm of Haven, McKay & Co. were the owners of about two acres of land in the village of Grandville, Kent county, Michigan, on which they had erected a steam stave and heading mill, which they had run and operated for some considerable time prior to that date. Said mill was always used exclusively in the business of manufacturing staves and heading. The mill building, when completed, cost about $1,500. It was a stout frame, about 40 by 50 feet square, two stories high, inclosed, having a shingle roof, and was built for the express purpose of being used on said land as a stave and heading mill, and to have placed therein all the machinery hereinafter referred to. The building was well adapted to this use. After the removal of said machinery, and at the date of removal, the building was of little value, not exceeding $200. The business of running the mill had proved unprofitable, and had been abandoned. Haven, Blake & Co. having failed in business. The firm of Haven, McKay & Co., upon the completion of said building, placed therein the following machinery, all of which was a part of the mill, and was necessary to constitute such mill, and to furnish it with steam power to operate, viz.: One steam-engine, weighing between five and six tons, resting upon a solid foundation of wood, brick, and stone laid in mortar, and was securely fastened; two steam-boilers, weighing each about five tons, each resting upon a foundation laid in brick and mortar, and both arched over with brick laid in mortar, and they could not have been taken out without taking down some portion of the building,—that is, without removing the siding from some portion of the building; one smoke-stack, connected and used with said boilers; one circle stave-cutting machine, weighing one and one-half tons; and one machine for dressing and circling heading, weighing about 800 pounds. Both these machines were securely bolted down upon the floor by bolts running through the floor, and through timbers below the floor, and these securely fastened. The machines were connected with the main shaft by belts, and were operated by the power furnished by the engine. All this machinery was well adapted to the use the firm was putting it to. This entire machinery remained in the same position as when first placed in the mill until its removal, in March, 1880, as hereinafter stated. On the twenty-eighth day of December, 1873, the firm of Haven, Blake & Co., composed of John V. D. Haven, Joseph Blake, Levi Day, and Dwight Rankin, purchased of said firm of Haven, McKay & Co., and the same was conveyed to them by deed, as real estate, said property, and they immediately took possession of the same, and operated and ran said mill until December, 1877.

(2) While Haven, Blake & Co. so owned the property, and on January 16, 1875, they procured the plaintiff and one Hiram Jenison to indorse their note for $3,000, payable to the order of said William Manwaring and Hiram Jenison. At its maturity this note, without going to protest, was renewed by the giving of a new note signed by Manwaring and Jenison, payable to the order of Haven, Blake & Co. This new note was renewed from time to time until December 28, 1877, when Manwaring was compelled to and did pay the sum of $1,900 thereon. At the time of the making of the first note Haven, Blake & Co. gave to said Manwaring and Jenison a chattel mortgage to save them harmless from loss for indorsing said note. Said mortgage was filed in the office of the clerk of the town of Wyoming, January 15, 1875 that being the place of residence of the mortgagors, and the property being also there situate. The chattel mortgage covered the property in issue in this suit, and about 300 cords of stave and heading botts lying in the mill-yard. The machinery is described in the mortgage as being "now in use in this mill in Granville."

(3) On the thirteenth day of January, 1876, said mortgage was renewed by the filing of the following affidavit:

"County of Kent, Township of Wyoming—ss.: I, William Manwaring, one of the mortgagees named in the mortgage given by Haven, Blake & Co. to Hiram Jenison and William Manwaring, January 16, 1875, for the sum of three thousand dollars, do hereby certify that the sum of twelve hundred and seventy-five dollars is claimed by me to be due thereupon at the date hereof, which sum constitutes the amount of interest of Hiram Jenison and William Manwaring in the property therein mentioned and described. Wm. Manwaring.

"Subscribed and sworn to before me this thirteenth January, 1876. James A. Knowles, Notary Public, Kent Co., Mich."

—And also renewed again February 21, 1877, by the filing of the affidavit given below, as follows:

"State of Michigan, County of Kent—ss.: Wm. Manwaring, the within mortgagee, being duly sworn, says that there is now due and unpaid on the said mortgage hereunto annexed the sum of two thousand dollars by virtue of said mortgage, and therein mentioned. Wm. Manwaring.

"Sworn to and subscribed before me this fifteenth day of February, 1877. Wm. H. Galloway, Justice of the Peace."

(4) The mill was closed up and stopped running, and the company became insolvent. The property in question remained in the mill, and on the thirtieth day of July, 1877, Manwaring procured a constable to advertise and sell the same; and on July 30, 1877, said constable posted his notice of sale, of which the following is a copy, which was the only notice given of said sale, to-wit:

"Chattel Mortgage Sale. By virtue of a chattel mortgage now in my hands, I shall sell to the highest bidder, at the stave-mill, in the village of Grandville, Kent Co., state of Michigan, on the eleventh day of August, 1877, at one o'clock p. m., all the personal property herein described: Two steam-boilers, one smoke-stack, one engine, one stave-cutting machine, and one machine for dressing and circling heading, and 50,000 staves, more or less. James Jewell, Constable. July 30, 1877."

At the time and place named said Jewell appeared and sold the property at auction, pursuant to the terms of the chattel mortgage to William Manwaring, he being the highest bidder therefor. The property was bid in at the sum of $274.90, and Manwaring received a memorandum of his purchase from Jewell. Previous to the sale the said Jewell seized the property under the chattel mortgage by going into the mill, July 30, 1877, and announcing that he seized the property under the mortgage aforesaid. At the time of the sale the property was in view of the officer, but no part of it was detached from the mill, and the plaintiff did not then, nor at any other time, attempt to detach or remove said property from the mill, or any part of it, and did not exercise, or attempt to exercise, any control over it, excepting that after his purchase he claimed to own the property and offered it for sale.

(5) In the month of March, 1880, the defendant sold the property in question, which was still attached to the mill, for the sum of $1,400 to one Adolph Leitelt, which sum was paid by said Leitelt to defendant, the said property being then worth $1,400. Said Leitelt removed the property to Grand Rapids, and used it in his business. Nothing was done with it by defendant, except to sell it to Leitelt. Plaintiff never demanded it of defendant, nor in any manner attempted to get possession of it.

(6) The title to the property in question claimed by Luman Jenison at the time of his said sale was this, to-wit: The firm of L. & L. Jenison, composed of Luman and Lucius Jenison, were creditors of Haven, Blake & Co. for goods and supplies furnished to said firm of Haven, Blake & Co. by said L. & L. Jenison, commencing on the twenty-ninth day of December, 1873, and continuing along from time to time up to the first day of October, 1875, at which time the amount of such indebtedness was over $1,700.

On the twelfth day of June, 1876, the said firm of L. & L. Jenison commenced a suit against the said firm of Haven, Blake & Co., by attachment, to collect said indebtedness, and on the date of the issuing of said writ the same was duly levied upon the two acres of land aforesaid upon which this mill was situated, and of which this machinery was a part. This suit was duly prosecuted to effect, and on the fourth day of November, 1876, a judgment was duly rendered in favor of the plaintiffs and against the defendant for the sum of $1,793.17, damages and costs to be taxed. Execution was duly issued on this judgment November 4, 1876, and was duly levied upon said property on the eighteenth day of November, 1876; and the said property was duly advertised and sold by the said sheriff as real estate, by virtue of said writ, on the twenty-eighth day of May, 1877, to the plaintiff in said writ, for the sum of $900, the sheriff giving and causing to be filed the proper certificate of such sale; and subsequently, and on the nineteenth day of September, 1878, the property not being redeemed, he executed and delivered to said purchaser a deed of said property in pursuance of such sale. At this sale Manwaring was present, and gave notice of his claim to the property in question, and the Jenisons, when they bought, knew of his claim. The defendants in said execution were the owners of said property at the time of the levy of the attachment, as well as at the levy of the execution aforesaid, and, from the time they purchased the same as aforesaid, they never sold or incumbered it in any manner, except by the chattel mortgage aforesaid.

(7) The plaintiff never had any lien on the property in question in this suit, or title thereto, except such lien as he acquired by virtue of the chattel mortgage aforesaid, and such title as he acquired by virtue of the sale under the notice, and by said Jewell, as aforesaid.

The circuit judge further found, as a matter of law, from the facts above stated, that the plaintiff was the owner of the property at the time of the sale and conversion of the same by the defendant, and that it was worth $1,400; and rendered judgment for the plaintiff in the sum of $1,815.42.

The defendant alleges that the facts found do not support the judgment, and brings error.

It is claimed that the plaintiff acquired no property in the goods and chattels in question here for several reasons: First, That

the machinery in issue in this suit was real estate, and therefore not subject to chattel mortgage. Second. The first renewal of the mortgage was not in sufficient compliance with the statute, in that it does not state any amount as being owing or unpaid upon it. The second renewal was not in time, not being filed until February 21, 1877. How. Ann. St. § 6196. Third. The mortgage being given as an indemnity against loss upon the note indorsed by plaintiff and Hiram Jenison, and that note not being protested, but a new note given by the indorsers as makers in its stead, the lien of the mortgage was lost. By the note not being protested, Manwaring and Jenison were discharged from all liability thereon; and the paying of the new note by plaintiff would not come under the terms of the mortgage. Fourth. The power of sale in the mortgage was to the mortgagees jointly, and not severally. Manwaring alone could not execute the power. Fifth. The sale was void because the notice thereof was insufficient in several particulars, to-wit: (a) It does not pretend to be by virtue of the mortgage; (b) it does not give the name of mortgagors or mortgagees, the date, or any other means by which the mortgage could be identified or found; (c) it does not claim to be done by order from or under any authority of the mortgagees, or either of them. Sixth. Manwaring could not purchase at the sale, being only one of the mortgagees. Seventh. If the plaintiff claims the property as mortgagee instead of purchaser, then he cannot recover without joining the other mortgagee, Hiram Jenison. Eighth. There should have been a demand for the property before suit.

There is no question as to the validity of the attachment proceedings, and the title of the defendant is undisputed, save by the claim of the plaintiff under this chattel mortgage, and the sale by virtue of the power of sale contained therein.

The first question involved is the character of the property in issue. The defendant claims that, at the time the chattel mortgage was given, this machinery was a part of the realty, and not subject to its lien, and that it remained a part of the realty until its severance by Leitelt, and that the sale of the real estate, under the execution in the attachment proceedings, carried the title of this property to the defendant as purchaser at such execution sale. There are many conflicting decisions in the books as to the dividing line between realty and personalty in cases where machinery has been affixed to mills and other buildings for use therein. A large number of cases hold that, if the article is attached for temporary use, with the intention of removing it, it does not lose its character as personalty; but if it is placed there for permanent improvement of the freehold, it becomes a part of the realty. Hellawell v. Eastwood, 6 Exch. 295, 312; Lancaster v. Eve, 94 E. C. L. 717; Crane v. Brigham, 11 N. J. Eq. 29; Walmsley v. Milne, 97 E. C. L. 114; Walker v. Sherman, 20 Wend. 636; Potter v. Cromwell, 40 N. Y. 287. But most of the American authorities agree that the question of the intention of the party or parties affixing the machinery enters into the elements of each case. The permanency of the attachment, and its character in law, does not depend so much upon the degree of physical force with which the thing is attached, or the manner and means of its attachment, as upon the motives and intention of the party in attaching it. If the intention is that the articles attached shall not by annexation become a part of the freehold, as a general rule they will not. The exception is where the subject or mode of annexation is such as that the attributes of personal property cannot be predicated of the thing in controversy (Ford v. Cobb, 20 N. Y. 344), as when the property cannot be removed without practically destroying it, or when it, or part of it, is essential to the support of that to which it is attached (Tifft v. Horton, 53 N. Y. 377; Voorhees v. McGinnis, 48 N. Y. 278; Winslow v. Insurance Co., 4 Metc. [Mass.] 306; Crane v. Brigham, 11 N. J. Eq. 29-35; McKea v. Bank, 66 N. Y. 489; Sisson v. Hibbard, 75 N. Y. 542; Eaves v. Estes, 10 Kan. 314; Trull v. Fuller, 28 Me. 548; Ballou v. Jones, 37 Ill. 95; Wade v. Johnston, 25 Ga. 331; Teaff v. Hewitt, 1 Ohio St. 511, 530; Hill v. Wentworth, 28 Vt. 428, 436).

In our own state it has been repeatedly held that the most important test in determining the character of the machinery affixed to a building is the intent of the parties making the annexation. Coleman v. Manufacturing Co., 38 Mich. 40; Crippen v. Morrison, 13 Mich. 23; Adams v. Lee, 31 Mich. 440; McAuliffe v. Mann, 37 Mich. 539; Jones v. Detroit Chair Co., 38 Mich. 92; Robertson v. Corsett, 39 Mich. 777; Ingersoll v. Barnes, 47 Mich. 104, 10 N. W. 127; Ferris v. Quimby, 41 Mich. 202, 2 N. W. 9. The rule is concisely laid down in these words by Chief Justice Campbell in Wheeler v. Bedell, 40 Mich. 696: "There is no universal test whereby the character of what is claimed to be a fixture can be determined in the abstract. Neither the mode of annexation, nor the manner of use, is in all cases conclusive. It must usually depend on the express or implied understanding of the parties concerned." The case of Wheeler v. Bedell was a contest between the holder of a real-estate mortgage upon the land, which mortgage contained no reference to the planing-machine, and the holder of a chattel mortgage upon the planer, as to the title of it. The planing-machine was in the building when the real-estate mortgage was given, and weighed about three tons, and was fastened to the floor at each end with cleats and two bolts, from a part called the hanger, through the floor, and was fastened to sticks under the joists, with nuts and screws. It was connected with the line shaft by belts. The chattel mortgage was given after the real-estate mortgage, and with notice of it.

The title was found to be in the holder of the chattel mortgage.

In the case before us, the intention of Haven, Blake & Co., who put this machinery in the mill, is gathered only from the mode of annexation and manner of use of the machinery, and the subsequent acts of Haven, Blake & Co., who were their successors. The machinery, save the engine and boilers, were fastened to the building nearly identical with the planing-machine in Wheeler v. Bedell. Haven, Blake & Co. no doubt treated it all as personalty, and such was the understanding evidently between them and the plaintiff. They were then the owners of the real estate, and could have secured him upon the land if the intention had not been to treat the machinery as personal chattels that could be removed at any time. There was nothing about this machinery that prevented its removal and use away from the building. The fact that the building was of but little value without the machinery cuts no particular figure in the case, if the intention of the parties is to control, nor that the building was used for no other purpose than that of a stave and heading factory. Sisson v. Hibbard, 75 N. Y. 542. And the further fact that the engine and boiler could not be removed without removing the siding from some portion of the building is not controlling, and cannot affect the plaintiff's rights. The removal did not take away or remove that which was essential to the support of the building; neither did it destroy or injure the chattels themselves; nor was the injury to the walls or sides of the building shown to be great either in extent or amount. That they were susceptible of removal, and of use elsewhere, is shown by the findings, and defendant's own sale of them to Leitelt. Tifft v. Horton, 53 N. Y. 384; Sisson v. Hibbard, 75 N. Y. 544, 545; Crippen v. Morrison, 13 Mich. 31, 32.

The finding that this machinery was beneficial and necessary to the use of the mill does not of necessity stamp it as realty. Mills and factories are generally set up as entireties for the purpose of manufacturing; but, according to the current of modern decisions, as shown in Crippen v. Morrison, the ultimate purpose is disregarded, and the machinery therein, including even the engine and boilers, may be treated and regarded as chattels, especially where such is the intent of the parties interested; and if the articles are not expressly made for use in the particular mill, and not elsewhere, and equally capable of beneficial use, on being removed and set up, in some other building, they may be either real or personal property, according to the intent of the parties in each particular case. Robertson v. Corsett, 39 Mich. 783.

The cases relied upon as supporting a contrary doctrine in this state by the defendant's counsel are Lyle v. Palmer, 42 Mich. 316, 3 N. W. 922, and Morrison v. Berry, 42 Mich. 389, 4 N. W. 731. In the case of Lyle v. Palmer the machinery in question was described in and covered by the real-estate mortgage, though it is stated that the parties supposed it to be personal. It was decided that Palmer, the trustee in bankruptcy of the mortgagors, could not hold the machinery, even if it was considered to be personalty; but Justice Cooley in his opinion remarks that the machinery was specially adapted for "use in connection with the real estate; it was put up for use, and actually used with it, and was not severed from the realty in ownership;" and therefore concludes that the parties were mistaken in supposing it to be personal property. But in a dissenting opinion in Morrison v. Berry, the same justice, on page 397, 42 Mich., and page 734, 4 N. W. 731, in discussing that case, says "that the question of fixture or no fixture depends upon the intention of the parties," and quotes approvingly the language of Chief Justice Campbell in Wheeler v. Bedell. The controlling opinion in Morrison v. Berry was placed upon the ground that the intention of both parties was explicit that the articles were to become a part of the freehold, and therefore does not aid the defendant's case here; and Justice Cooley dissented for the reason that the permission of the plaintiffs, the Berry Bros., that the things annexed should become a part of the freehold, was obtained by fraud, and that they had a right to withdraw their consent when the fraud was discovered and claim the property as personalty, the same as if no consent had ever been given.

In the case at bar there is no finding that this machinery was specially adapted or built for this particular building, but that it "was well adapted to the use the firm was putting it to" in the mill. It was just as well adapted for use in any other mill for the same purposes. When we take into consideration the large number of mills temporarily erected all over the country for the manufacture of staves, heading, and other articles, while the timber may last in a particular section, and then the machinery to be removed elsewhere to be put in another temporary structure for like uses; and the fact that this class of machinery is manufactured for sale and use, without reference to any particular building, and to be employed in various mills until worn out or destroyed,—it would not be in harmony with the general method of doing business, nor desirable, to make any or all of the characteristics of the annexation or use of this machinery in this mill the guide in determining whether it should be considered real or personal property, regardless of the intention of the parties, nor do I think there is any fixed or controlling rule of law requiring such holding.

The finding in regard to the value of the building without the machinery seems to be somewhat conflicting. It is stated, in one part of the finding, that the mill building, when completed, cost about $1,500, and in another that, at the date of the removal of the machinery, it was of little value, not exceed-

ing $200. It was probably never worth the item of its cost. It was no doubt built for the purpose of covering the machinery, and supporting it in position while in use. It might well be said, under the findings in this case, that the building itself was not placed upon the premises for the permanent improvement of the freehold, but for temporary use with the machinery while there was timber to be obtained in the vicinity for staves and heading. Such buildings or mills are not generally designed to be permanent as are gristmills and other manufacturing establishments that do not depend in their use upon the quantity of material for manufacture within easy reach, but which can be operated, if desired, as long as the community where they are located may exist. The purchaser under the execution sale did not intend to carry on a business in this mill, which had become unprofitable, and been abandoned by Haven, Blake & Co., presumably because its use had been unprofitable on account of the scarcity of material in the neighborhood. The defendant saw no value in this mill and machinery as real estate, but sold the articles in question here as personal property to one wishing and intending to use them elsewhere. When Haven, Blake & Co. mortgaged the property to Manwaring and Jenison, they could have made it personalty by the mere severance of it from the building. I think, when they so mortgaged this machinery, no other person's rights then intervening or being affected by it, it was in law such a severance as would make the articles, between them and the mortgagees, personal property. I do not suppose that it will be claimed that, in a controversy between the mortgagees and Haven, Blake & Co., the latter could dispute the lien of the mortgage upon the ground that the articles were not chattels, but part of the real estate. Corcoran v. Webster, 50 Wis. 125, 6 N. W. 513.

The purchaser under the execution sale does not stand in the relation of a bona fide purchaser of the land without notice of the rights of the plaintiff. He only took, by his levy, the same title his judgment debtors had. It gave him a lien upon all the right, title, and interest of Haven, Blake & Co., but upon no better title. The question of good faith as purchaser at the execution sale does not arise, as there can be no claim of estoppel against either Haven, Blake & Co. or the plaintiff. At the time of sale he was notified and knew of plaintiff's claim, and he acquired no new equities thereby. French v. De Bow, 38 Mich. 708; Michigan Paneling M. & M. Co. v. Parsell, Id. 475; Bank v. McAllister, 46 Mich. 398, 9 N. W. 446; Drake v. McLean, 47 Mich. 102, 10 N. W. 126; Sisson v. Hibbard, 75 N. Y. 546.

It must be conceded that in this state, as well as others, under many decisions, that if the mortgage in this case had been given before these articles were put in the mill, their attachment, as they were affixed, would not have changed their character as chattels. Crippen v. Morrison, 13 Mich. 23; Ingersoll v. Barnes, 47 Mich. 104, 10 N. W. 127; Tifft v. Horton, 53 N. Y. 377; Voorhees v. McGinnis, 48 N. Y. 278; Sisson v. Hibbard, 75 N. Y. 542. Therefore I see no reason why the annexation of these articles to this building, before the mortgage was executed, should prevent their being treated as personalty, when it is manifest that it is the intent of the parties, and not the annexation, that controls and fixes their status. As shown in Crippen v. Morrison, the placing of a chattel upon the soil, or by fixture to a building upon the soil, never by necessity makes it a part of the realty where the chattel is yet separable, and capable of being removed by the owner. The cases cited by defendant's counsel from Massachusetts hold a different doctrine, for the reason "that the intention of the parties to change it to personal property is one which the law will not carry into effect." Richardson v. Copeland, 6 Gray, 538; Gibbs v. Estey, 15 Gray, 589; Pierce v. George, 108 Mass. 82. This, however, is not the law in this state.

The first renewal of the mortgage was sufficient. It sets forth that $1,275 "constitutes the amount of interest of Hiram Jenison and William Manwaring in the property therein mentioned and described." It is in compliance with the statute. How. Ann. St. § 6196. The second affidavit was not filed in time, but was sufficient in form. The attachment levy under which the defendant claims was made June 12, 1876, and judgment obtained November 4, 1876. The levy, by execution upon this judgment, was made November 18, 1876, and sale under such levy took place May 28, 1877, at which sale the plaintiff was present, and gave notice to the builders of his claim under the mortgage. It will be seen that the mortgage was in force by virtue of the first renewal, when both the attachment and execution levies were made; and, when the sale was made, the second renewal had been in force under the exception to the statute for over three months. The exception to the statute reads as follows: "Provided that, such affidavit being made and filed before any purchase of such mortgaged property shall be made, or other mortgage received, or lien obtained thereon in good faith, shall be as valid to continue in effect such mortgage as if the same were made and filed within the period as above provided." How. Ann. St. §§ 6196, 6197.

When the defendant acquired his attachment and execution lien, the mortgage was valid, and he had constructive notice of plaintiff's rights under the same; and also, when he purchased, he had both actual and constructive notice. He must take his lien as it stood when he acquired it. He did not gain any element of good faith by the simple omission of plaintiff to file his affidavit in time. If the renewal had not been made before the sale, a different question might have arisen, but it is not necessary to discuss it here. The

defendant obtained his lien and made the purchase at the sale while the mortgage was in force under the statute, and must be held as concluded thereby. The debt upon which he obtained judgment was not incurred during the month this mortgage was not renewed. Indeed, his claim was adjudicated and fixed by judgment while the mortgage was in force under the first renewal, which was in time and valid.

When the note upon which Manwaring and Jenison were indorsers became due, it was not necessary that they should wait for the protest of the note in order to keep their indemnity mortgage alive. They had a right to pay the note by giving their own, as they did, and hold their security, as they did; and if, instead of renewing the old note, they saw fit to change the character of their liability to the holder of the paper, with the consent of Haven, Blake & Co., no one else has any reason to complain.

It is claimed that Hiram Jenison had nothing to do with the sale, and that it was directed by Manwaring alone, who had no right, under the power of sale in the mortgage, to do so. The record does not show but that Jenison acquiesced in all that Manwaring did. The finding is simply that Manwaring procured the constable to advertise and sell the same. In the absence of any proof to the contrary, it would be presumed, we think, the advertisement and sale was made with Jenison's consent. At least, he does not complain of it. There is no doubt but Manwaring had a right to purchase the property at the sale. It was not necessary that he and Jenison should both be present and bid together, or that he should purchase the property in the names of both. There is no warrant in the statute for any such idea. How. Ann. St. § 6200.

The only remaining objection necessary to notice is the one that the notice of sale was insufficient. The notice does not give the date of the mortgage, or its amount, or the names of either mortgagors or mortgagees, but describes the property, and there is no complaint that the notices, such as they were, were not sufficiently and properly posted as to time or places of posting. It does not appear that any one was misled by this notice. There was but one mortgage upon the property, and that was on file in the proper office. Any one seeing the notice, and wishing to bid upon the property, could easily inform himself as to the identity of the mortgage. Was the sale void because of the failure in the notice to describe the mortgage more accurately, and the omission therefrom of the names of the mortgagors and mortgagees? We think not. The power of sale, in default of the payment by Haven, Blake & Co. of the note indorsed by Manwaring and Jenison, authorized the mortgagees "to sell at public auction, after the like notice as is required by law for constables' sales, the goods, chattels, and personal property" described in the mortgage. The statute governing constables' sales on execution, in force at the time of the sale in question here, and in relation to the notice thereof, provided that the constable should "give public notice, by advertisement signed by himself, and put up at three public places in the city or township where the goods and chattels shall be taken, when and where they will be exposed for sale." Comp. Laws 1871, § 5414. The notice was required to be put up at least five days before the time appointed for the sale. Comp. Laws 1871, § 5415. Under this statute it was held in Perkins v. Spaulding, 2 Mich. 160, that the omission of the name of the defendant in execution would not vitiate a sale; and it was never considered necessary to insert the name of the plaintiff in execution. Cow. Treat. § 1620. The statute has also, since then, received a legislative construction by the amendment of 1879, prescribing that the notice must contain the names of the parties to the suit. How. Ann. St. § 6980. Notices of foreclosure sale on chattel mortgages have also in other states been held valid, notwithstanding the defects pointed out in the present notice. Jones, Chat. Mortg. § 795; Waite v. Dennison, 51 Ill. 319; McConnell v. Scott, 67 Ill. 274; Fitzpatrick v. Fitzpatrick, 6 R. I. 64. In Waite v. Dennison the notice gave neither the date of the mortgage nor the names of the parties to it. It was not signed by any one, but stated in the body of the notice that the sale would be made by W. A. Butters & Co., without stating in what capacity they were acting. It was shown aliunde that they were the agents of the mortgagee. While the power must be strictly pursued, it is only necessary that it be fairly executed. There is nothing to be gained by requiring, in a sale of this kind, any technicalities, the want of which has injured no one.

The omissions complained of in this notice are mere irregularities. There is no showing in the record that the defendant lost anything thereby; and, if the strict letter of the power of sale was not complied with, there was no wrong to defendant. No one could complain but the mortgagors, and they seem to be content. The plaintiff, as mortgagee, had a right to take possession of the property, and the defendant's act of selling and removing it was a conversion. McConnell v. Scott, 67 Ill. 277. The amount bid for the property by Manwaring cuts no figure in the case, because the amount of the mortgage debt, at the time of sale, was more than the value of the property. If a thousand bidders had attended the sale, and the record is silent as to the attendance, and run the property up to its full value or more, it would not have been of any benefit to the defendant, as the mortgage debt in that event would have swallowed the property.

There was no necessity for making any demand before suit. The defendant had full notice of plaintiff's claim, and was a trespasser from the beginning.

The judgment is affirmed, with costs.

The other justices concurred.

MERCHANTS' NAT. BANK OF CROOKSTON v. STANTON et al.

(56 N. W. 821, 55 Minn. 211.)

Supreme Court of Minnesota. Nov. 13, 1893.

Appeal from district court, Polk county; Ives, Judge.

Action by the Merchants' National Bank of Crookston against Robert Stanton, S. L. Dobson, and others to foreclose a mortgage. From a judgment for plaintiff, defendants Dobson and another appeal. Reversed in part.

A. A. Miller, for appellants. John Cromb and A. C. Wilkinson, for respondent.

MITCHELL, J. The real issues in this case are somewhat obscured by the prolixity of the stipulated facts, (adopted by the trial court as its findings,) which contain much that was unnecessary for the determination of the case in the court below, and still more that is immaterial in the decision of any question involved in this appeal. The primary object of this action was to foreclose a mortgage, and the principal question in the case is whether a certain building and the machinery therein, situated on the mortgaged premises, was, as between the plaintiff and defendants Dobson and Martin, the personal property of the latter, or a part of the realty, and hence covered by plaintiff's mortgage. The short facts, so far as material to that question, are as follows: Defendant Stanton executed to plaintiff the mortgage in suit on his own real estate to secure the joint debt of himself and defendant Dobson. Subsequently Dobson, "with the knowledge and consent" of Stanton, erected and put on the mortgaged premises the building and machinery referred to, at his own sole expense, and mainly with money loaned to him by defendant Martin, to whom, as security for its repayment, he executed a bill of sale and chattel mortgage on the building and machinery. The building was a large, two-story frame structure designed for "an oatmeal mill," with a one-story brick addition for an engine and boiler room, in which were placed machinery suitable to manufacture oatmeal, and an engine and boiler, pulleys and shafting, sufficient to operate the same. This machinery was of the kind usually put in oatmeal mills, and was placed in and attached to the building in the usual way, some of it being screwed to the floor of the building, and some of it bolted to framework which was fastened to the floor, and some of it held in position by its own weight, and all of it operated by shafting and belting, with power furnished by the engine and boiler. There is no doubt but that such a building and machinery would, in the absence of any agreement of the parties to the contrary, become a part of the realty, and belong to the owner of the soil. Prima facie, all buildings belong to the owner of the land on which they stand as part of the realty. It is only by virtue of some agreement with the owner of the land that buildings can be held by another party as personal property. If erected wrongfully, or without such agreement, they become the property of the owner of the soil. But it is entirely competent for the parties to agree that they shall remain the personal property of him who erects them, and such an agreement may be either express or implied from the circumstances under which the buildings are erected. The trial court has made no direct or express finding as to whether there was any such agreement between Dobson and Stanton, and the question here is (first treating the case as if the controversy was between them) whether the facts found establish prima facie an implied agreement for separate ownership of the building and machinery. The fact that Stanton had mortgaged this property to secure a debt owing by Dobson as well as himself has no bearing upon the question in hand. That fact would not render it to Dobson's interest to expend his own money for the benefit of the land. Neither does the fact that the building was erected with money furnished to Dobson by Martin affect the question. Hence, reducing the facts found to their lowest denomination, they amount to just this: Dobson, who had no estate in the land, erected the mill at his own expense on the land of Stanton, "with the knowledge and consent" of the latter. The court did not find, and the stipulated facts do not disclose, a single other fact bearing on the question of the intention or implied agreement of the parties. The finding does, however, amount to one that the building was erected by permission and license from Stanton. At first we entertained some doubt whether this alone was sufficient to establish an implied agreement for separate ownership. Such an implication would not be drawn when a different intention of the parties is indicated by the terms of any express agreement between them on the subject, or when a different intention is to be inferred from the interest of the party making the erections or from his relations to the title of the land. But we have arrived at the conclusion that, where the erections are made by one having no estate in the land, and hence no interest in enhancing its value, by the permission or license of the owner, an agreement that the structures shall remain the property of the person making them will be implied, in the absence of any other facts or circumstances tending to show a different intention. This seems to us a reasonable doctrine, and one supported by the authorities, although we admit that in all the cases we have examined, including our own case of Little v. Willford, 31 Minn. 173, 17 N. W. Rep. 282, there were always some other facts or circumstances in evidence bearing upon the question of the intention of the parties. Indeed, it would be difficult to conceive of

any case where this would not be the fact if all the circumstances bearing on the question were fully in evidence. The present case comes up in the peculiar shape it does because submitted on stipulated facts probably more or less incomplete. See Howard v. Fessenden, 14 Allen, 124–128; also Prince v. Case, 2 Amer. Lead. Cas. (5th Ed.) 562. We are therefore of opinion that the facts found establish prima facie an implied agreement between Dobson and Stanton for separate ownership of this building and machinery, and hence that, at least as between them, they would have remained the personal property of Dobson.

But plaintiff contends that to render it personal property as to it, it should have been a party to the agreement to that effect; and that, in the absence of any such agreement on its part, its rights must be determined by the rule which obtains between mortgagor and mortgagee, which is that all fixtures annexed to the land by the mortgagor become part of the mortgage security; and that the mortgagor could not give to a tenant or licensee a right which he himself did not possess. Independently of any technical grounds, there are manifestly good reasons why this should be the rule as to the mortgagor himself, for, being the owner of land, and presumably looking to its redemption, it must be presumed that what he adds to it is for the benefit of his own estate, which he can always save by redeeming the premises. It undoubtedly was formerly the rule that all fixtures annexed subsequently to the execution of the mortgage, whether annexed by the mortgagor or by his tenant or licensee under a lease or license subsequent to the mortgage, became, as to the mortgagee, a part of the realty. But this rule was founded upon the old common-law doctrine that a mortgage was a conveyance under which the mortgagee became the legal owner, and was entitled to immediate possession, the mortgagor in possession being considered strictly his tenant at will. This is still the rule in those states—notably Massachusetts—which adhere to the doctrine that a mortgage is a conveyance. But the reasons for the rule have no application where, as in this state, a mortgage is a mere security, and neither conveys the title nor gives any right to the possession. Hence in those states where a mortgage is, as with us, a mere security, there is a general tendency to repudiate the old rule as inapplicable, and to hold that, as to fixtures placed on the mortgaged premises subsequently to the execution of the mortgage there is no absolute presumption that they were annexed for the benefit of the realty, and that, where the intention or agreement of the mortgagor and the party making the annexation was that the thing annexed should not become part of the realty, the absence of a concurrent agreement to that effect on part of a prior mortgagee will not, of itself, make the annexation a part of the mortgage security. This would seem just, for, the annexation not having been made when he took his mortgage, he has not been misled, or advanced anything on the faith of it, and hence ought not to be permitted to avail himself of it as a part of his security, contrary to the intention of the party making the annexation. Crippen v. Morrison, 13 Mich. 23; Davenport v. Shants, 43 Vt. 546. See, also, Tift v. Horton, 53 N. Y. 380. We are therefore of opinion that, upon the facts presented by the record, plaintiff has no better or greater right to these annexations than Stanton would have.

Certain questions arise as to the correctness of the directions of the court as to the order in which the premises covered by the several mortgages of the parties should be sold, and as to the distribution of the proceeds. As only Dobson and Martin appeal, their rights alone can be considered, and the rights of the other defendants are material only so far as they bear upon the rights of the appellants. The material facts are as follows: Dobson owned three tracts of land, which, for convenience, we will call tracts A, B, and C, a part of C being his homestead. He and his wife executed first a mortgage on A; second, a mortgage on both A and B; and, third, a mortgage on C, (including his homestead,) as additional security for the same debt secured by the second mortgage. All of these mortgages are now held by the defendant Martin. Subsequently to the execution of these mortgages, Dobson and wife conveyed these tracts by warranty deed in the following order of time: First, tract A to defendant Stanton, who then executed thereon to plaintiff the mortgage now being foreclosed; second, tract B to defendant Cunningham; third, all of tract C, except their homestead, to defendant Palmer. In this action the plaintiff asks for the foreclosure both of its own mortgage and of the three Martin mortgages, and that the lands covered by all of them be sold, and the proceeds applied according to rights of the several parties. If seasonably objected to, perhaps all of this could not be done in this action, but none of the defendants objected to it, and defendant Martin, in his answer, unites with plaintiff in asking that it be done. In its judgment, the trial court, after directing that all four mortgages be foreclosed, and all the property covered thereby be sold, further directed, among other things: First, that all of the proceeds of the sale of tracts B and C be applied on Martin's second and third mortgages (which may be treated as one, being security for the same debt) before applying thereon any of the proceeds of tract A; second, that the several lots constituting tract C be sold separately, and that the lot constituting Dobson's homestead should only be sold in case the other property covered by the second and third mortgages did not bring enough to satisfy the debt secured thereby. The first of these directions was intended, in the interest of

plaintiff's mortgage, to marshal the securities so as to require Martin to exhaust the other property covered by his mortgages before resorting to tract A, on which alone plaintiff had a lien. Defendant Martin urges that marshaling of assets or securities is only admissible between creditors of the same common debtor, to whom both funds or securities belong. To this general rule there are some apparent exceptions, which, however, are within its spirit. For example, it will be allowed between creditors of different persons where it appears that the debtor whose estate is sought to be charged is primarily liable, and this for the same reason that subrogation may be admitted where the two securities belong to different persons if the fund not taken be one which in equity is primarily liable. Proceeding on the same principle is the equity rule that, if the owner of mortgaged lands sells portions of them to third parties, retaining part of them himself, unless the purchasers took cum onere, the portion so remaining in the mortgagor becomes the primary fund for the payment of the mortgage, and the portions sold are liable in the inverse order of their alienation. This is exactly this case. Stanton could have insisted on the application of this rule, and plaintiff, his mortgagee, stands, in that regard, in his shoes. The application of this same principle fully disposes of Dobson's contention that his homestead should not have been sold until all the other property covered by the Martin mortgages, including tract A, had been exhausted. In McArthur v. Martin, 23 Minn. 74, we held that where A. held a mortgage on two tracts of land, one of which was the homestead of the mortgagor, and B. held a judgment against him which was a lien only on the other tract, A. would not be compelled to resort to the homestead first in order to leave the other tract as far as may be to B. This was upon the ground that to apply the rule in reference to marshaling securities in favor of a judgment creditor, who obtains his lien by proceedings in invitum, and not by contract of his debtor, would be but an indirect method of subjecting a homestead to the payment of debts; that, under such circumstances, a judgment creditor has no equity as against the homestead right of the debtor and his family. But where, as in this case, the mortgagor and his wife have voluntarily conveyed, with covenants of warranty, a portion of the mortgaged premises, they have no equitable right to insist that their homestead shall be protected, to the displacement of the countervailing equity of their grantee that the portion of the mortgaged premises retained by them shall be the primary fund for the payment of the mortgage. In the absence of legislation or of express agreement to that effect, the courts are not warranted in interpolating any such stipulation into the contracts of parties.

The seventh conclusion of law of the trial court is also assigned as error. Taken literally, it might seem to mean that the court directed the payment to plaintiff of the proceeds of property not covered by its mortgage. The court certainly could not have intended this, and, if the language implies that, it was doubtless an inadvertent verbal inaccuracy, which the court would, and still will, correct upon his attention being called to it.

Upon the appeal of Dobson the judgment is affirmed, and upon the appeal of Martin that part of the judgment which adjudges that the mill and machinery referred to are a part of plaintiff's mortgage security, is reversed, and a new trial of that issue only is ordered.

BARTLETT v. HAVILAND.

(52 N. W. 1008, 92 Mich. 552.)

Supreme Court of Michigan. July 28, 1892.

Error to circuit court, Grand Traverse county; J. G. Ramsdell, Judge.

Trover by Wayland W. Bartlett against Adaline A. Haviland. From a judgment rendered on the verdict of a jury in favor of plaintiff, defendant brings error. Affirmed.

Pratt & Davis, for appellant. Dunham & Preston, for appellee.

GRANT, J. This is an action of trover for the conversion of 1 shingle mill frame, 1 knot sawing machine and arbor, 7 small circular saws, 200 feet of belting, 50 feet of shafting, 20 pulleys, 1 gemming machine complete, 1 shingle jointer complete, 1 wheelbarrow, 1 crowbar, 1 cant hook, and 1 edger complete. Plaintiff had verdict and judgment. The evidence tended to show the following facts: In 1872 a copartnership, composed of the plaintiff and two others, under the firm name of Bartlett, Bonny & Saxton, owned a piece of land upon which was situated a portable steam sawmill, containing a boiler, engine, and double circular mill, with some belting, which was covered by a building so that it could be taken out without injury. The firm, while owning both the land and the mill, gave a mortgage on the land, and a chattel mortgage upon the mill and machinery, to one Gregg. Subsequently plaintiff acquired the interest of his partners in both the land and the mill. This was in 1873. In 1876 the real-estate mortgage to Gregg was foreclosed. After the foreclosure plaintiff continued in possession of both the land and the mill as tenant. In 1880 the purchaser of the land at the foreclosure sale sold and conveyed it to plaintiff's wife, taking back a mortgage for part of the purchase price. Subsequently this mortgage was discharged, and Mrs. Bartlett gave a real-estate mortgage to Gage, who was evidently the purchaser at the foreclosure sale, for $200, dated January 14, 1884. Gage knew that plaintiff was in possession of the premises, and understood that he claimed to be running the mill, and had some machinery there, and he did not suppose that his mortgage covered the machinery. This mortgage was assigned by Gage to the defendant, who did not examine the property, and made no inquiries as to who was in possession. The property now in dispute was placed upon the premises after the execution of the first mortgage, and before the execution of the second mortgage by Mrs. Bartlett to Gage. Plaintiff took his wife's acknowledgment to the second mortgage. This mortgage was foreclosed, and bid in by the defendant. After the time of redemption had expired she took possession of the land, and of this property, claiming that it was covered by the mortgage. The machines were fastened to the floor by cleats or bolts, in such a manner that they could be removed without injury to the building, while the saws were hung upon hooks.

It was said by this court in Scudder v. Anderson, 54 Mich. 126, 19 N. W. 775: "It is impossible to regard personal property, capable of removal from the land, which does not belong to the landowner, as part of the realty." Upon the question of fixtures this case is ruled by that case, and Conrad v. Mining Co., 54 Mich. 249, 20 N. W. 39. Plaintiff was a tenant at the time he placed the machines upon the land. There was therefore no unity of title to the realty and the machinery. There is no conflict about the material facts, and the court would have been justified in instructing the jury that the property had not become a part of the realty. I see no reason in holding that plaintiff is estopped to assert title by the fact that he witnessed and took the acknowledgment of his wife's mortgage. There was nothing in the mortgage to indicate that it covered this property. Plaintiff was in possession, the mortgagee knew it, and understood that he claimed the property. The assignee of the mortgage occupies in this case no other or different position from that of her assignor. There is no room for the doctrine of estoppel. Objections were raised to the admission of certain evidence, and to portions of the charge of the court, but under the above disposition of the case they become immaterial. The judgment is affirmed. The other justices concurred.

LANSING IRON & ENGINE WORKS v. WALKER.

(51 N. W. 1061, 91 Mich. 409.)

Supreme Court of Michigan. April 22, 1892.

Error to circuit court, Jackson county; Erastus Peck, Judge.

Trover by the Lansing Iron & Engine Works against James Walker. Judgment for plaintiff. Defendant brings error. Affirmed.

Thos. E. Barkworth, for appellant. Cahill & Ostrander, for appellee.

McGRATH, J. In November, 1886, plaintiff and one Myers entered into a written contract, by the terms of which plaintiff agreed to sell to Myers "one stationary Standard sawing rig complete, which includes one 30-horse-power engine, 10x16; No. 5 boiler, with throttling or automatic governor, whichever is considered best, with all boiler fixtures; Standard mill complete, with 54-inch planer, saw, belting, pipes, and connections, etc.; and one picket mill, with 36-inch solid saw, with friction feed, etc., rigged for cutting pickets, ½ in. and up, with proper shafting and pulleys, to run with or without the above Standard sawmill. Said machinery to be ready for delivery at the Lansing Iron Works, Lansing, Mich., on or about the 28th day of November, 1886. * * * It is further agreed that the title and right of possession of the aforesaid machinery shall remain in the above first party until the price is paid in full, according to the notes accompanying this contract, when the same shall vest in the party of the second part. But it is also agreed that the second party may take said machinery, when completed and delivered, and run the same in the township of Sandstone, county of Jackson, and in adjacent townships, and retain and use it so long as he takes reasonable care of the same, and is not in default in any of his payments as herein provided." Payments were to be made under said contract, $150 on or before the delivery of the machinery, $350 on or before June 1, 1887, and the balance in two annual payments. Myers paid the $150, and the machinery was delivered to him. He owned an undivided interest in a farm in the township of Sandstone, to which he removed the machinery, and set it up. The boiler was bricked in and arched up, and the engine was set upon brickwork, and bolted down to the foundation. The boiler and engine were covered over,—a part with a board roof, and a part with a shingled roof. The sawmill and carriage were uncovered. In February, 1888, Myers conveyed the farm by quitclaim deed to the defendant, and trover is brought by reason of the refusal to pay the balance due plaintiff, under the agreement between plaintiff and Myers. The court directed a verdict for plaintiff for the amount of the balance, and defendant appeals.

Defendant contends that the case should have been submitted to the jury upon the question of fact raised by the testimony as to whether the purchase made by defendant from Myers was one made in good faith for a valuable consideration, and without notice of any claim of the plaintiff against the property purchased. The case is ruled by Adams v. Lee, 31 Mich. 440, and Robertson v. Corsett, 39 Mich. 777. In Adams v. Lee, the court say: "All the time, therefore, the parties have had title to the machinery distinct from their title to the land, and this fact of itself is conclusive that the former was personalty; for to constitute a fixture there must not only be physical annexation in some form to the realty, but there must be unity of title, so that a conveyance of the realty would of necessity convey the fixture also. When the ownership of the land is in one person, and of the thing affixed to it is in another, and in its nature is capable of severance without injury to the former, the latter cannot, in contemplation of law, become a part of the former, but must necessarily remain distinct property, to be used and dealt with as personal estate only. And the fact that the owner of the thing affixed to the freehold has also an undivided interest in the latter, cannot render the former a fixture when the interests are different in extent. A thing cannot, as to an undivided interest therein, be real estate, and as to another undivided interest be personalty. It must be the one thing or the other. And the position which is taken by Lee in this case involves this absurdity: that Kaufman, at the time when he and Kinney were severally the owners of an undivided half of the land, might have sold that, and, as a necessary consequence, transferred an undivided one-half of the machinery also, though the whole of the machinery belonged to Kinney as exclusive owner. This would be the necessary result if the machinery was real estate, for there could be no such a thing as attaching it to an undivided interest in the land only." In Morrison v. Berry, 42 Mich. 389, 4 N. W. 731, the ownership of the land and of the thing affixed was in one and the same person. It was there held that the annexation of the thing to the freehold was not the wrongful act of the landowner, but that by act and intervention of the claimant the articles became a part of the freehold. In Knowlton v. Johnson, 37 Mich. 47, T. owned the land and mill. S. was the lessee. The water wheels were a part of the structure. Plaintiffs furnished the water wheels to S., with the understanding that they were to be put in the mill, and there used; and, against the objection of T., the old wheels were taken out and the new put in. Six months afterwards S. surrendered his lease, and T. leased to M. T. finally sold the mill property to defendant, and plaintiffs brought trover. The court say: "The plaintiffs deliberately agreed that the water wheels should be converted in all outward appearance into real property, and they thereby put it in the power of Trimmer to make sale of the wheels as part of the mill." In the

present case the contract of sale provided for the use of the machinery, not only in the township of Sandstone, but in adjoining townships. Myers was not the sole owner of the land upon which it was placed, but he was sole owner of the interest in the machinery, and operated it solely in his own behalf. The structure covering the boiler and engine was but a temporary one. The machinery in question did not consist simply of a pulley, shaft, or wheel which was to be attached to other machinery already a part of a sawmill, and, as such, a part of the realty, but it was a complete outfit, designed by the agreement to be portable. There was nothing done by plaintiff indicative of an intent to permit the machinery to be so annexed to realty as to change its character. The state of the title to the realty, and the conduct of Myers regarding the machinery, negatived any intent on his part to allow his interest in the machinery to be absorbed by the owners of the realty, or to permit it to be merged. The circumstances of the purchase by defendant clearly indicate that he took the entire interest in this machinery, while he took but an undivided interest in the realty. He afterwards operated the machinery as sole owner. It was held in Wheeler v. Bedell, 40 Mich. 693–696, that there is no universal test by which the character of what is claimed to be a fixture can be determined in the abstract; neither the mode of annexation nor the manner of use is in all cases conclusive. It must usually depend on the express or implied understanding of the parties concerned. In Coleman v. Manufacturing Co., 38 Mich. 30–40, the court, commenting upon a line of authorities which seem to regard the manner of the attachment to the realty as the test, say: "This, however, is a very extreme view, and is hardly compatible with the tenor of our own previous decisions. It seems to overlook or ignore one test, namely, the intent of the party making the annexation." See, also, Manwaring v. Jenison, 61 Mich. 117, 27 N. W. 899. The judgment is affirmed.

The other justices concurred.

FITZGERALD v. ANDERSON.

(51 N. W. 554, 81 Wis. 341.)

Supreme Court of Wisconsin. Feb. 23, 1892.

Appeal from circuit court, Douglas county; R. D. Marshall, Judge.

Replevin by Thomas Fitzgerald against N. J. Anderson. Judgment for plaintiff. Defendant appeals. Reversed.

The other facts fully appear in the following statement by Winslow, J.:

Replevin to recover a frame dwelling-house, 16 by 20 feet in size, standing upon blocks upon appellant's land. The house was built by one Rudd while in possession of the premises as tenant of Anderson. When Rudd left the premises, he sold the house to Fitzgerald, who sublet the house to one Eastman. Afterwards, Fitzgerald prepared to move the house off from appellant's land, and appellant stopped the removal, whereupon this action was brought by Fitzgerald. Upon the trial a verdict for respondent was directed and rendered, and, from judgment entered thereon, Anderson appeals.

Swift, Murphy & Bundy, for appellant. Ross, Dwyer & Smith, for respondent.

WINSLOW, J. (after stating the facts). It is settled that landlord and tenant may, by their agreements, treat as personal property improvements which would otherwise be part of the realty, and thus convert them into personal property, to all intents and purposes, as between themselves. Smith v. Waggoner, 50 Wis. 155, 6 N. W. 568. It is also settled that the right to remove such improvements must ordinarily be exercised by the tenant while still in possession under his lease, or it will be lost. Keogh v. Daniell, 12 Wis. 164; Josslyn v. McCabe, 46 Wis. 591, 1 N. W. 174. It appearing here that Rudd, the original tenant and builder of the building, abandoned the premises without removing the building, the purchaser of the building cannot recover unless, by some agreement with the owner of the real estate, the right of removal was preserved until after possession was given up by Rudd. The plaintiff's case must depend entirely upon the existence of such an agreement; and, unless it be proven by uncontradicted testimony, the verdict for the plaintiff should not have been directed. Plaintiff depends upon the following testimony of Rudd, which was not contradicted by Anderson, to establish this fact: "Was there anything said as to whether you had or had not the right to move the house? Answer. No." "Was there anything said between you and Anderson in reference to your having the right to move the house at the time? A. Well, it was that said you know; it was said I should have the house just so long until he should sell the lot, he should want me to move." "Then you should move it off? A. Yes, sir." We regard this testimony as entirely insufficient to justify the court in directing a verdict for plaintiff. It contradicts itself squarely, and counsel would be entirely justified in arguing to the jury that the first answer was true and the succeeding ones false, and was entitled to so argue. Furthermore, it is doubtful whether the last two answers, taken alone, should be construed as extending the time within which the building might be removed until after surrender of possession. This is not necessary to be decided, however, as it is plain that upon the flat contradiction in Rudd's evidence a verdict for the plaintiff should not have been directed. For this error the judgment must be reversed.

There was no error in rejecting the record of the quit-tenant proceedings against Eastman. That action appears by the record to have been brought by A. J. Anderson. The defendant's name is N. J. Anderson. The variance is fatal.

It is objected that replevin will not lie for a building, even though as between the parties it be personality. Such a doctrine was once maintained, but the current and weight of modern authority is that replevin may be brought; and no good reason is perceived why, if the building be to all intent and purposes personalty, as between the parties to the action, and it be not actually attached to the soil, the remedies appropriate to personalty should not be used. Cobbey, Rep. § 364, and cases cited. Judgment of the circuit court reversed, and action remanded for a new trial.

FREE v. STUART et al.

(57 N. W. 991, 39 Neb. 220.)

Supreme Court of Nebraska. Feb. 7, 1894.

Appeal from district court, Douglas county; Hopewell, Judge.

Action by M. E. Free against Stuart & Schemensky and George W. Sautter and another to foreclose a chattel mortgage. There was judgment for plaintiff, and defendants Sautter and another appeal. Reversed.

Chas. Offutt, for appellants. Cavanagh, Thomas & McGilton, for appellee.

NORVAL, C. J. This action was brought in the court below by appellee, M. E. Free, to foreclose a chattel mortgage given by the defendants Stuart & Schemensky on two greenhouses erected by them on leased real estate owned by appellants, George W. Sautter and Frank Sautter. The cause was tried by the district court upon a written agreed statement of facts, signed by the attorney of the respective parties, of which the following is a copy: "(1) In the spring of 1888 the said Geo. W. and Frank Sautter were the owners in fee of a certain dwelling house, without outbuildings and about ten acres of land surrounding, in the outskirts of the city of Omaha, and within the limits of said city. That at said time said Sautter brothers rented the house and outbuildings only from April 1, 1888, to March 1, 1889, to the defendant C. Schemensky, for $100.00. The rent for this term was paid. (2) At the end of this term said Geo. W. and Frank Sautter rented the house, barn, orchard, vineyard, and all the land for one year for $200.00, the lease expiring March 1, 1890, and of this rent the tenant, Schemensky, paid $93.00, leaving a balance still unpaid of $107.00. (3) At the end of this term, on March 3, 1890, said Geo. W. and Frank Sautter rented the same premises for another year to said Schemensky for $225.00, the lease expiring March 1, 1891. Of this rent there was paid $13.40. (4) At the end of the last term the tenant, Schemensky, held over until May 12, 1891, at which time the tenant quit the possession and occupation of the premises, leaving a total of rent unpaid amounting to the sum of $341.60, no part of which has yet been paid. (5) That in the spring of 1890 said Schemensky requested permission of said Geo. W. and Frank Sautter, owners of said premises, to erect thereon two buildings and a boiler house, and that the same were erected during the spring and early summer of 1890. They were erected by building the same out of planks and posts, with the use of glass and sash, as is usually the case in greenhouses, the said boards or planks being fastened to a number of upright posts that were inserted and fastened into the ground for a distance of about two feet below the surface. The framework was built around said posts. (6) That there was also constructed in said greenhouses a boiler for the purpose of heating the same, by building a brick foundation down into the ground, and building said brick up over and around said boiler, leaving it stationary, and pipes were attached to and ran from said boiler through the various portions of the house so constructed, and fastened to the said greenhouse, in order thereby to conduct the heated water, and for the purpose of keeping the temperature in a condition required for greenhouses. The two buildings used as greenhouses were each 75 feet long and 10 feet wide, and were covered with glass and sash. They were constructed by nailing strips running from post to post, and onto those strips the planks for the sides and ends were nailed securely; and said houses and boiler are still remaining on said premises as when originally constructed. (7) On January 14, 1891, said Schemensky and one Stuart, who were partners as Stuart & Schemensky, executed to the plaintiff a chattel mortgage, a true copy of which is attached and made a part of plaintiff's petition herein, and the same was filed in the office of the county clerk of Douglas county, Nebraska, on said 14th day of January, 1891, at the hour of 3:45 P. M., and duly indexed in said office, as required by law in case of chattel mortgages, said chattel mortgage being to secure the amount of money stated therein; and the amount now due thereon and unpaid by said mortgagors to the plaintiff is $182.40. (8) Said property was leased for the purpose of using the residence as a dwelling house, and the land for the purpose of gardening, raising flowers and shrubs, it having been used for this purpose for several years last past. At the time said houses were constructed, there was nothing said by the tenant about removing said greenhouses, boiler, and boiler house at the expiration of the lease or at any other time. (9) The plaintiff claims a lien on said houses and boiler by virtue of the foregoing chattel mortgage, and the defendants George W. and Frank Sautter claim them as fixtures to, and a part of, said land." The trial court found that Stuart & Schemensky executed and delivered to plaintiff the chattel mortgage described in the petition to secure an indebtedness of $163.84; that the buildings described in said mortgage were erected by the mortgagors upon leased premises, and were such fixtures as the tenants had a right to remove; and that said houses are subject to the said chattel mortgage. From a decree of foreclosure and sale the Sautters appeal to this court.

The point in dispute is, which party is entitled to the buildings covered by the mortgage? The mortgagee claims them by virtue of his mortgage, while the appellants insist that, as the improvements were erected by tenants on leased premises, they are a part of the realty, and neither the tenants nor the mortgagee had a right to remove them, at least after the expiration of the tenancy. The larger portion of the brief of counsel on either side is devoted to the discussion of the

law of fixtures, and what are, and what are not, movable fixtures. The decisions on the subject are at variance and irreconcilable. We have not the time at our disposal now to review the authorities cited in the briefs, or to discuss the question, nor is it essential that we should do so. For the purposes of this case we will assume that the buildings in controversy were trade fixtures, and were erected under such circumstances as to entitle the tenants to remove them had they exercised that right in time. The authorities are quite uniform to the effect that, in the absence of an agreement or understanding to the contrary, a tenant cannot re-enter, and remove his fixtures and improvements, after the expiration of his tenancy. By surrendering possession he forfeits his rights to them. The rule on the subject is well stated by Mr. Taylor in his valuable work on Landlord and Tenant, thus: "The decisions also agree that whatever fixtures the tenant has a right to remove must be removed before his term expires, or at least before he quits possession; for, if the tenant leaves the premises without removing them, and the landlord takes possession, they become the property of the landlord. The tenant's right to remove is rather considered a privilege allowed him than an absolute right to the things themselves. If he does not exercise the privilege before his interest expires, he cannot do it afterwards, because the right to possess the land and the fixtures as a part of the realty vests immediately in the landlord; and, although the landlord has no right to complain, if the land be restored to him in the same plight it was before he made the lease, yet if the land is suffered to return to him with additions and improvements, even by forfeiture or notice to quit, he has a right to consider them as part of his property." And in the case of Friedlander v. Ryder, 30 Neb. 787, 47 N. W. 83, in considering the authority of a tenant to remove his fixtures, we said: "Under the lease, as established by the evidence, the tenant had a right, before the surrender of possession, to remove any improvements owned by him which are embraced under the head of tenant's fixtures, but the tenant had no authority to remove such improvements after the termination of the tenancy; in other words, the tenant could not re-enter to remove his fixtures after the surrender of his possession to the landlord." It appears from the stipulation that the lease under which the tenants occupied the premises expired on March 1, 1891, and that on the 12th day of May following they quit possession without removing the buildings which they had erected by permission of the owner of the realty. The record fails to disclose that there was any agreement or understanding between the parties about the removal of the improvements at the expiration of the lease or any other time. In view of these facts, there could be no doubt that the tenants have forfeited their right of removal.

Counsel for appellee contend that the tenancy had not expired when the tenants surrendered possession; that they were tenants from year to year; and although the lease terminated March 1, 1891, they having occupied the premises for several months after that time, the lease was thereby continued in force for another year, or until March, 1892. It is a familiar doctrine that where, in case of a tenancy from year to year, the tenant continues to occupy the property after the expiration of his lease by the consent of the landlord, it will be presumed, in the absence of an express agreement to the contrary, that the lease is extended for another year; but we are unable to see how this rule can aid the appellee, since the tenants voluntarily abandoned possession, and it does not appear that either they or the landlord, after such abandonment, regarded the lease in force. The doctrine that the right of a tenant to remove his improvements must be exercised before the expiration of his lease applies alike to cases where the tenancy terminates by lapse of time, and to cases where it is determined by his own act. He may forfeit his right to remove his fixtures by voluntarily surrendering the possession to the landlord without reservation. It is quite probable, however, that such surrender would not affect the previously acquired rights of the tenants, vendees, or mortgagees. They should have the right to enter and remove the fixtures at any time before the lease would, by its terms, have expired. In the case at bar no attempt has been made to remove the buildings at any time. They were on the premises when the decree of foreclosure was entered, which was long after March 1, 1892, and it is not claimed that the tenancy continued after that date. Upon principle as well as authority we are constrained to hold that the mortgagees forfeited their right to the buildings by their failure to exercise it during the tenancy.

It is finally contended that since the tenancy had not expired when the mortgage was given, and inasmuch as the tenants could have removed the mortgaged fixtures, the appellee's rights vested and became fixed, and were not affected by the subsequent termination of the lease. The mortgage conferred the same rights upon the mortgagee to remove the fixtures that the mortgagors had, and no greater. Appellee was therefore required to exercise the privilege of removal during the tenancy. In principle, the case at bar is not distinguishable from Friedlander v. Ryder, supra. In that case a creditor caused an execution to be levied upon a tenant's fixtures. It was held that the creditor thereby acquired no greater right to re-enter, and remove them, than the tenant had. A case precisely in point is Smith v. Park, 31 Minn. 70, 16 N. W. 490. There a tenant during his term had executed a chattel mortgage upon a frame building upon leased premises. The landlord claimed the building, and the mortgagee brought replevin aft-

er the lease expired. The court held that the mortgagee's right to remove the building was lost. The court, in the opinion, say: "The plaintiff stands in no better position than did Burgess, [the tenant.] His right to the property, as against the landlord, is only such as the tenant under whom he claimed had. It was for him to see to it that the building was removed within the time which, by the law and terms of the contract, was given to the tenant for such a purpose." Our conclusion is that the trial court erred in decreeing the foreclosure of the mortgage. The decree is therefore reversed, and the action dismissed. Judgment accordingly. The other judges concur.

ADAMS v. LEE.

(31 Mich. 440.)

Supreme Court of Michigan. April 13, 1875.

Error to circuit court, Van Buren county.

George W. Lawton, for plaintiff in error. Lester A. Tabor, for defendant in error.

COOLEY, J. The fundamental error of the court in this case was in treating the machinery in question as having been fixtures annexed to the freehold. A brief recital of the facts in the case will show that such could not have been their legal character:

The real estate in question was owned by John H. Kaufman May 29, 1867. Before that time, under some arrangement not shown, and not now important, a building had been erected upon this real estate, and machinery for the manufacture of wool had been put into the same, which was owned by Augustus E. Hardy. The machinery appears to have been annexed to the building in a substantial manner. On the day named, Kaufman conveyed an undivided one-fourth of the real estate to Hardy, and the latter sold to Kaufman an undivided one-half of the machinery. This made Kaufman owner of three-fourths the land and one-half the machinery, and Hardy the owner of one-fourth the land and one-half the machinery. January 29, 1868, Kaufman sold an undivided fourth of the real estate, together with his half of the machinery, to Warren G. Kinney. This made Hardy and Kinney owners of the undivided one-half of the real estate and of the whole of the machinery. August 25, 1868, Hardy sold to Kinney, giving him a deed of an undivided one-fourth of the real estate, and delivering possession, which of course would be sufficient to transfer the title to any personalty which might have been included in the sale. On this sale, Kinney gave to Hardy a mortgage on the undivided one-half of the real estate to secure the payment of the purchase price, or a part thereof. The machinery was not mentioned in this mortgage, but Lee, who has become purchaser of the mortgaged premises on the foreclosure of this mortgage, claims that the mortgage covered the machinery as fixtures, and so it was held by the circuit court. Adams, on the other hand, asserts a right to the machinery by a purchase of it as personal property, made by him from Kinney previous to the foreclosure.

An examination of these facts will show that at no time has there been unity of ownership of the land and the machinery put into the building. Kaufman at the outset owned the one without having an interest in the other, and no one of the parties who subsequently acquired an interest had a right in the land co-extensive with his interest in the machinery. All the time, therefore, the parties have had title to the machinery distinct from their title to the land, and this fact of itself is conclusive that the former was personalty. For, to constitute a fixture, there must not only be physical annexation in some form to the realty, but there must be unity of title, so that a conveyance of the realty would of necessity convey the fixture also. When the ownership of the land is in one person, and of the thing affixed to it is another, and in its nature is capable of severance without injury to the former, the latter cannot, in contemplation of law, become a part of the former, but must necessarily remain distinct property, to be used and dealt with as personal estate only. And the fact that the owner of the thing affixed to the freehold has also an undivided interest in the latter, cannot render the former a fixture when the interests are different in extent. A thing cannot, as to an undivided interest therein, be real estate, and as to another undivided interest, be personalty; it must be the one thing or the other. And the position which is taken by Lee in this case involves this absurdity; that Kaufman, at the time when he and Kinney were severally the owners of an undivided half of the land, might have sold that, and, as a necessary consequence, transferred an undivided one-half of the machinery also, though the whole of the machinery belonged to Kinney as exclusive owner. This would be the necessary result if the machinery was real estate, for there could be no such a thing as attaching it to an divided interest in the land only.

Lee claims, however, that, if the machinery continued to be personal estate after being put up in the building, Adams was nevertheless a wrong-doer in taking it out of the building, because if personalty, the title to it was never transferred by any of the conveyances of interests in the land. And, to take advantage of this view, he has obtained assignments from Kaufman and Hardy of any right of action they, as owners of the machinery, might have against Adams for taking it away. These assignments bear date in October, 1873. But it clearly appears that Kaufman sold his right in the machinery to Kinney, and it is equally apparent that Hardy did the same thing. The failure to mention the machinery in the deeds of conveyance was of no importance; no writing was requisite to transfer the title to this, any more than to any other personalty.

This view of the case renders it necessary to consider whether Lee, on his own theory of the case, had any cause of action, the machinery having been taken off the premises before he became purchaser at the foreclosure sale. His position relatively to the mortgage and the mortgaged premises was peculiar, but the facts become immaterial.

The judgment must be reversed, with costs, and a new trial ordered.

CAMPBELL, J., and GRAVES, C. J., concurred.

GILLET v. MASON.

(7 Johns. 16.)

Supreme Court of New York. 1810.

Error on certiorari from justice's court.

Mason declared against Gillet, before the justice, in an action of trespass, for cutting down a tree containing a swarm of bees and honey, which the plaintiff below had before found, and had marked the tree with the initials of his name.

Gillet pleaded the general issue, and there was a trial by jury.

Mason proved that previous to bringing this suit he had found a tree containing a swarm of bees standing on the land of Timothy Gillet, lately deceased, father of the defendant; that he marked the tree with the initials of his name, "A. M."; that the defendant had cut down the tree, and taken and carried away the bees and honey; and that the tree contained a large swarm of bees and a large quantity of honey, of the value of $10. It was admitted by the plaintiff that the land where the tree stood belonged to Timothy Gillet, but it was denied that the defendant was his heir, or had any possession of the land. It was admitted that defendant was a son of Timothy Gillet. The justice, in charging the jury, put the cause on the point, which of the parties first reclaimed the bees from a wild state; and the jury found a verdict for the plaintiff below, for nine dollars.

PER CURIAM. Bees are considered by Judge Blackstone (2 Comm. 392) as feræ naturæ; but, when hived and reclaimed, a qualified property may be acquired in them. Occupation of them, according to Bracton (that is, having or inclosing them) gives the property in bees. In the present case it appears the bees were not hived before they were discovered by the defendant in error, and the only act he did was to mark the tree. The land was not his, nor was it in his possession. Marking the tree did not reclaim the bees, nor vest an exclusive right of property in the finder, especially in this case, against the plaintiff in error, who, as one of the children of Timothy Gillet (who does not appear to have made a will), must be considered as one of the heirs, and, as such, a tenant in common in the land. Blackstone (volume 2, p. 393) inclines to the opinion that under the charter of the forest, allowing every freeman to be entitled to the honey found within his woods, a qualified property may be had in bees, in consideration of the soil whereon they are found, or an ownership, ratione soli. According to the civil law (Just. Inst. lib. 2, tit. 1, § 14), bees which swarm upon a tree are not private property, until actually hived; and he who first incloses them in a hive becomes their proprietor.

Judgment reversed.

See Ferguson v. Miller, 1 Cow. 243.

ADAMS v. BURTON et al.

(43 Vt. 36.)

Supreme Court of Vermont. Windsor. Feb. Term, 1870.

Trespass and case. Plea, not guilty and notice. Trial by the Court, December term, 1869, BARRETT, J., presiding. It appeared that early in August, 1868, the plaintiff tracked and found a swarm of bees in a tree growing on the land of Ira Burton in Norwich; and in a few days informed said Ira of the fact, and that he intended to cut down the tree and get the honey,—to which said Ira made no objection,—he supposing that the finder of a bee tree, on the land of another, had a right to take the bees and the honey; and he so said to the plaintiff. It did not appear whether he would have made objection if he had not so supposed. He made no claim in respect to the bees or the honey that might be in the tree; and though he was given by plaintiff to understand in what region on his land the supposed bee tree was, he did not know in what tree the plaintiff supposed the bees were. A day or two after this, and early in the morning of the 3d of August, 1868, the plaintiff, with Pineo to help him, went to the tree, and they were in the process of chopping it down, for the purpose of getting the honey, claiming the right to do it, when the defendant, Henry Burton, with the defendant Thompson, acting for and under him, having heard that the plaintiff had found a bee tree in that vicinity, were out trying to find it, for the purpose of cutting it down and getting the honey. They saw the plaintiff and Pineo at work chopping the tree; whereupon they went to the tree, knowing the claim of right, on the part of the plaintiff, and the defendant Bur-
*37 ton interposed himself in such a *way as to prevent the plaintiff from chopping more upon the tree, and to cause him and Pineo to give up the attempt further to cut it down. And said Burton proceeded at once—with Thompson helping him—to finish the work that the plaintiff and Pineo had begun, of chopping it down. And they found the supposed swarm of bees in it, and 150 lbs. of honey; which honey they took and carried away, and the said defendant Burton used it for his own purposes. The defendant Burton, after hearing that the plaintiff had found a bee tree in that vicinity, and desiring and intending to cut it down and get the honey, if he could find it, told his brother, the said Ira, of his desire and intention, just before he went out as aforesaid to try to find the tree,—and said Ira expressed consent that he might do so, said Ira not interesting himself in any way in the matter, by claim or otherwise in his own behalf, or as between the plaintiff and the defendant Burton, and knowing that the plaintiff supposed that he, the plaintiff, had a right to get the honey, by reason of having tracked the bees and found the tree. The court rendered judgment for the plaintiff for $32.40 and his costs. To this the defendants excepted.

S. E. & S. M. Pingree, for the defendants.

C. M. Lamb, for the plaintiff.

The opinion of the court was delivered by

PIERPOINT, C. J. It appears from the facts found by the county court, that in August, 1868, the plaintiff traced and found a swarm of bees in a tree standing upon the land of one Ira Burton; that soon after he informed said Ira of the fact, and told him he intended to cut down the tree and get the honey; that said Ira made no objection to his doing so; set up no claim to the bees or the honey, but told the plaintiff he supposed he had the right to cut the tree and take the honey. Whether this can be regarded strictly as a license or not, it was clearly a waiver of any right he had in the matter, as the owner of the tree, and was sufficient to warrant the plaintiff in going on and cutting the
*38 tree, without making himself *a trespasser thereby. After this the defendant, learning that the plaintiff had found a "bee tree" on the said Ira's land, but not knowing the precise locality of it, went to the said Ira and told him he intended to find the said tree and cut it down and get the honey, and this the said Ira consented to. This again was a waiver of the right of the said Ira in favor of the defendant—thus virtually placing the plaintiff and the defendant upon the same footing so far as the rights of the said Ira, as the owner of the tree, were concerned. In assenting to the proposition of the defendant, there was no attempt to revoke or interfere with any authority or right that the plaintiff had, either as the discoverer, or as derived from the said Ira, to cut the tree and take the honey, and we think there would be no such legal effect resulting therefrom. This being so, these parties stand, as between themselves, and as respects the legal principles applicable to the case, in precisely the same position, as though neither had any authority from the owner of the tree, and both were trespassers upon his rights, or as though there was no individual owner of the tree. How then would the case stand. No principle is better settled, than that a person in possession of property, can maintain trespass against any one that interferes with such possession, who cannot show a better right, or title.

In this case, the plaintiff first found the bee tree; he thus acquired all the rights that appertain to the person who first discovered the home of the bees, whatever those rights may be. He proceeded to take possession of the tree, for the purpose of removing the honey, and when the defendants interfered with him, he was in the act of cutting the tree; he literally had his hand upon the hive; he was as much in possession as he would have been if he had cut the tree down, and had been in the act of removing the honey from its place of deposit, and the honey as certainly secured; the honey is all that is sought in such cases, and all that is of value, as the bees cannot be secured; the operator would much prefer to have them leave, as they always make a vigorous defense of the homestead, and those who thus rob the bees of their treasure generally have other stings to endure than those of conscience.

In this case the defendants not only robbed the bees, the penalty for which *they doubtless paid at the time, *39 but they also robbed the plaintiff of his rights. They drove him from the actual possession of the property, and seized and appropriated it to their own use, they having no superior right to the plaintiff, thereby making themselves liable to him for the damage.

The county court having ascertained the damage and rendered a judgment therefor, that judgment must be affirmed.

Judgment affirmed.

TENHOPEN v. WALKER.

(55 N. W. 657, 96 Mich. 236.)

Supreme Court of Michigan. June 23, 1893.

Error to circuit court, Kent county; William E. Grove, Judge.

Action by Margaret Tenhopen against Thomas Walker. Judgment for plaintiff. Defendant brings error. Affirmed.

Dunham & Preston, for appellant. Francis A. Stace, for appellee.

LONG, J. Plaintiff recovered judgment against the defendant for $225, as damages in an action on the case for the malicious killing of her dog. It was shown on the trial that plaintiff's sons were walking along the highway. They were accompanied by the plaintiff's dog and two other dogs. When in front of defendant's premises, the dog of plaintiff turned into the defendant's grounds, just out of the highway, and approached a pond which was kept for lilies, apparently with the intent to slake its thirst. Defendant, seeing it from the upper window of his house, went down into the lower hall, got his gun, and, returning above, shot the dog from the upper window. It is not claimed that this dog had done any damage there at that or at any other time. On the trial the court permitted the defendant to show that upon several previous occasions other dogs had wallowed in this pond, destroying some of the plants there growing, and upon one occasion the owner of the dog, when remonstrated with by defendant, had called him vile names, and otherwise insulted and abused him. There was no fence in front of the premises, and this pond laid open to the highway.

At the close of the testimony, counsel for defendant asked the court to instruct the jury: "(3) If the court shall hold that this action can be maintained upon the facts disclosed in the plaintiff's declaration, then we ask the court to charge the jury that, in order to recover in this action, the plaintiff must show to the satisfaction of the jury that the defendant was moved to kill the dog through malice, either towards the dog or towards the plaintiff herself; that this must be shown by declarations of the defendant made before or at the time, showing a wicked and malicious purpose for such facts and circumstances as naturally and logically lead to the conclusion that the defendant was actuated by malice, by ill will, hatred, or a desire for revenge. (4) If the jury find from the evidence that the dog was committing a trespass upon the property of the defendant, and in shooting the dog the defendant was only seeking to prevent injury to his property, then there was no malice on his part, and plaintiff cannot recover. (5) If the jury find that the plaintiff is entitled to recover, then, in estimating the damages, they can only find the fair market value of the dog. (6) In examining and weighing the testimony of the witnesses as to the value of the dog, they should scrutinize it closely, and see upon what knowledge they base their opinion; that mere opinions, not based upon a knowledge of the character and qualities of the dog, are not evidence of his value; that statements of witnesses of the market value of the dog in question, or of such dogs, who have never dealt in such dogs, nor ever known personally of dealings by others ought not to be received, except with great caution." These instructions were refused, and the court directed the jury substantially that the plaintiff was entitled to recover actual damages, which would consist of the value of the dog at the time it was killed; and that, even if the dog was committing a trespass at the time it was killed, and, in the opinion of the defendant, was about to destroy some of his plants, it would not be a justification for the killing, or in any way mitigate actual damages, because the law affords a remedy for the destruction of property caused by the beasts of another. The court further directed the jury that there were but two questions for them to consider: (1) The value of the dog. (2) Was there malice? Upon the last proposition the court directed the jury: "If you find from the evidence that there was malice, and that these annoyances that I have mentioned did take place, you will consider these annoyances and those previous trespasses with a view of determining, in the first place, whether they fully rebut the claim of malice, whether they afforded an excuse or cause for killing the dog, to the extent that it would take away the malice; and, if you find in the negative upon that question, you are at liberty to consider them."

It was claimed on the part of the plaintiff that, if the jury found that the killing of the dog was willful and malicious, the plaintiff, in addition to actual damages, was entitled to recover exemplary damages. Upon this portion the court directed the jury substantially that, while actual damages could not be mitigated by the fact that defendant had theretofore been annoyed by other dogs, yet, if they found he had been so annoyed, or if he believed at the time that the plaintiff's dog was actually in the act of destroying some of his property, they might consider whether these facts could entirely rebut malice; and if, notwithstanding those facts might be found to exist, they believed that defendant was actuated by malice, they might even then award exemplary damages; for, if the defendant willfully and maliciously did the killing, exemplary damages would be recoverable. We see no error in the charge. The testimony tended to show that the dog was valuable. It was a "Gordon setter," eligible to registration, and some of the witnesses placed the value as high as $250. It had never, so far as this record shows, trespassed upon the defendant's premises, nor had he in any manner been

annoyed by it. On the day it was shot, it ran a few feet out of the highway to the edge of this lily pond, between which and the highway there was no fence, and, immediately as it reached the pond, defendant, without any warning to the boys who had it in charge, shot and killed it. The jury, under the charge as given, may or may not have found that the dog was killed willfully and maliciously, as the amount of the verdict is less than several of the witnesses placed its value; but there certainly was evidence which would have justified the jury in finding the act willful and malicious. The dog was not running at large, contrary to law, but was in the immediate charge of its keeper. It is settled in this state that dogs have value, and are the property of the owner as much as any other animal which one may have or keep. Heisrodt v. Hackett, 34 Mich. 283. Usually, where an act is done with design, and from willful and malicious motives, the law compels full compensation, and full compensation may not be awarded by the payment of the actual value. Damages in excess of the real injury are never appropriate where the injury has proceeded from misfortune, rather than from any blamable act; but, where the act or trespass complained of arises from willful and malicious conduct, exemplary damages are recoverable. These damages are not awarded as a punishment to the wrongdoer, but to compensate the injured party. Wetherbee v. Green, 22 Mich. 311.

All redress in damages partakes to some extent of a punitory character, and the line between "actual" and what are called "exemplary" damages cannot be drawn with much nicety. They are properly based upon all the circumstances of the aggravation attending it. The real purpose is to compensate the plaintiff for the injuries he has suffered. Stilson v. Gibbs, 53 Mich. 280, 18 N. W. Rep. 815; Wilson v. Bowen, 64 Mich. 133, 31 N. W. Rep. 81. It was said by Mr. Justice Cooley, in Stilson v. Gibbs, supra: "In some cases there may be a partial estimate of damages by a money standard; but the invasion of the plaintiff's rights has been accompanied by circumstances of peculiar aggravation, which are calculated to vex and annoy the plaintiff, and cause him to suffer much beyond what he would suffer from the pecuniary loss. Here it is manifestly proper that the jury should estimate the damages with the aggravating circumstances in mind, and that they should endeavor fairly to compensate the plaintiff for the wrong he has suffered. The compensation to the plaintiff is the purpose in view, and any instruction which is calculated to lead the jury to suppose that, besides compensating the plaintiff, they may punish the defendant, is erroneous." In the present case, the court below submitted to the jury the question whether the defendant was actuated by malice, and was guilty of willful conduct in shooting the dog. The rights of the defendant were fully protected, as all the circumstances prior to the commission of the act were permitted to be put in by the defendant, showing the annoyances he had had from other dogs, and the provoking and insolent conduct of the owners of the other dogs when remonstrated with by him. The jury found that these facts did not constitute an excuse for killing the plaintiff's dog, and, we think, very properly. In cases of malicious injury, it is not necessary that there should be actual enmity towards the person injured. Brown v. State, 26 Ohio St. 176. In Wright v. Clark, 50 Vt. 130, it appeared that plaintiff's dog drove a fox upon the land of defendant's father. Defendant came up and shot the dog. On the trial he claimed that he was shooting at the fox, and accidentally shot the dog. No enmity appeared to have existed between the parties. The court charged that, if the defendant intentionally and wantonly shot the dog, they might give exemplary damages. It was held that such intentional and wanton shooting implied malice, and that the instructions given were correct. Some other errors are claimed. We have examined them, and do not deem them of sufficient importance to notice, and they are overruled. Judgment affirmed, with costs. The other justices concurred.

KELLOGG v. LOVELY.

(8 N. W. 699, 46 Mich. 131.)

Supreme Court of Michigan. April 27, 1881.

Error to Shiawassee.

McBrider & Fraser, for plaintiff in error. McKercher & Bush, for defendant in error.

GRAVES, J. The circumstances of this controversy are as follows. In October, 1878, the defendant sold the plaintiff on credit a mare, buggy and harness for the agreed price of $250 and the plaintiff gave his note together with a mortgage on the property for the entire sum.

The mare was with foal and about the first of June following she dropped the colt. On the first of July the mortgage became due, and Kellogg failing to pay, Lovely proceeded to take the property. There was no dispute about his right to take the mare, buggy and harness, but the parties appear to have differed about the colt. Lovely maintained that the mortgage applied to it and gave him the same right to the colt that it did to the mare, but Kellogg contested this claim and contended that the colt being the offspring of the mare was his property and not having been born when the mare was purchased and the mortgage given was not subject to the mortgage.

The colt had not been weaned and was running with the mare and when Lovely drove her off the colt followed. Lovely soon afterwards proceeded to sell the whole property, the colt included, under the mortgage, and we gather from the case that it was bought in for him through an agent. The whole sum for which the property was struck off was $176, and shortly afterwards Kellogg paid the remainder of the debt. He then instituted replevin against Lovely before a justice of the peace to obtain the colt and it was seized on the writ and delivered into his possession. The justice entered a nonsuit against him and Lovely waiving return of the colt the value was assessed at $55, for which Lovely took judgment. An appeal was made and the circuit court reduced the assessment to $30 and awarded Kellogg $78 costs and extinguished the former by applying an equal amount of the latter by way of set off. Thereupon Kellogg sold the colt and brought this action of trespass, counting on the transaction when Lovely took the mare on the mortgage. The justice gave judgment in Kellogg's favor for the value of the colt and Lovely appealed. The circuit judge ruled that there was no evidence of trespass and ordered a verdict for Lovely. It is not certain that the circuit judge was correct in the reason on which he proceeded. But whether he was or not is unimportant unless the result was wrong.

The fundamental question in the case relates to the effect on the legal ownership of the colt, of the sale of the mare to Kellogg and the mortgage back. In respect to tame and domestic animals the general rule is well understood, that "the brood belongs to the owner of the dam or mother" (2 Bl. Comm. 390), but there are many cases in which the rule is qualified in its application. It has been held and may be true in special cases that where the female is hired for a time limited and has increase during the term the hirer will be entitled to it and not the general owner. 2 Kent, Comm. 361; Edw. Bills, § 402; Putnam v. Wyley, 8 Johns. 432; Conclin v. Havens, 12 Johns. 314; Hanson v. Millett, 55 N. H. 184; Stewart v. Ball, 33 Miss. 154. And so too it was decided in Linnendoll v. Terhune, that a foal obtained under an agreement by which the owner of the mare arranged with another person that if he would put her to horse and pay the expense he should have the foal, became the property of such person. 14 Johns. 222.

It is also laid down by Judge Story that where a thing is pledged its natural increase as accessory is also pledged, and he gives by way of illustration the case where a flock of sheep are pledged, and observes that the young afterwards born, are also pledged. Bailment, § 292; and see Domat, part 1, bk. 3, tit. 1, § 1, art. 7; Kauf. Mackeldy, book 1, § 267. In Iowa and Kentucky, and probably in other states, it has been decided that the young of animals under mortgage are subject to the mortgage (Forman v. Proctor, 9 B. Mon. 124; Thorpe v. Cowles, 7 N. W. 677, 3 Iowa, 649); and no cases to the contrary have been discovered. Perhaps these last decisions may have originated in the doctrine that the mortgagee of chattels is the legal owner; and the courts may have considered that in holding the young of mortgaged animals to be subject to the mortgage, they were only applying the general rule which assigns the increase to the owner of the mother. But it is useless to speculate on the subject.

The case before the court belongs to a peculiar and exceptional class, and it may be disposed of without bringing into question the general doctrine. As previously stated, the mare was carrying her colt when Lovely sold her, and the plaintiff, not paying anything whatever, gave back at the same moment a chattel mortgage for the entire price. There was no interval of time between the sale and mortgage. Each took effect at the same instant. The whole was substantially one transaction. Now it is a rule of natural justice that one who has gotten the property of another ought not as between them to be allowed to keep any part of its present natural incidents or accessories without payment, and that the party entitled should have the right to regard the whole as being subject to his claim. The one ought not to suffer loss, nor the other effect a gain, through a mere shuffle, and whatever fairly belongs to the thing in question, as the young the dam is carrying, belongs to her, ought to be as

fully bound as the thing itself, unless indeed there are circumstances which imply a different intention.

It is not unreasonable to construe the act of these parties by these principles and to consider that when Lovely sold the mare without receiving anything down and Kellogg gave back the mortgage for the whole purchase price to be due before the colt according to the ordinary course of things would be old enough to be separated from the mare, it operated as well to hold the colt as to hold the mare herself. The intendment is a fair and just one that the security was to be so far beneficial to Lovely as to preserve to him the right to claim at the maturity of the mortgage the same property he would have had in case he had made no sale. According to this view there was the same right to the colt as to the mare, and the act of seizure sued for was not a trespass. The result ordered by the circuit judge was therefore correct and the judgment must be affirmed with costs.

(The other justices concurred.)

WAIT v. BOVEE.

(35 Mich. 425.)

Supreme Court of Michigan. Jan. 16, 1877.

The plaintiffs in error are the heirs at law of Justin Wait, deceased, and the administrator of his estate; and defendant in error is administrator of the estate of Julia Wait, the wife of said Justin Wait. The facts are sufficiently stated in the opinion.

E. G. Fuller, for plaintiffs in error. N. P. Loveridge and Upson & Thompson, for defendant in error.

GRAVES, J. This controversy is between the estate of the husband on the one hand and that of the wife on the other, and it presents a single question.

At the time of their intermarriage the decedents were respectively possessed of about two thousand eight hundred dollars, and each had children by a former marriage.

Their marriage occurred in 1852, and each thereafter recognized the separate property rights of the other. They made investments jointly, each supplying half of the means, and they took all securities in their joint names. This course continued until March, 1873, when the husband died. At this time the personalty so handled and situated had swelled to a considerable amount. No question is involved concerning right to real estate, or any question concerning the rights of creditors. The point is confined to the right to this personalty as between the two estates, the wife also being now deceased. On the part of her estate it was claimed below, and is here, that in regard to these securities taken in the joint names, the old law of survivorship governs, and that as she outlived her husband she took the whole.

On the other side it is urged that no such rule now prevails in this state, whatever may have been the case formerly, and that the law now recognizes and protects the property interests of husband and wife in joint securities as separate and distinct interests when particular circumstances do not exist to show a contrary intention in the parties.

The judge of probate ruled against the right of survivorship claimed on behalf of the wife, and his order was appealed from to the circuit court. That portion of his order which so decreed was there reversed, and it was decided that by force of the law of survivorship the wife took the whole. The conclusion of the probate court was correct, and that of the circuit court was erroneous. As the case stood, the question was upon the bare legal effect of the husband's death in the lifetime of the wife upon the right to the securities taken by them jointly. Our own decisions relative to the rights of husband and wife in case of united holdings of real estate, afford no argument here. They were grounded upon the statutory preservation of the common-law doctrine, and which originated in and was developed by a policy not pertinent to cases of taking and holding of personal securities. There is no question on evidence as to whether there was a gift by the husband to the wife, or a contingent relinquishment of right by one to the other. The case fairly excludes all considerations of that kind. Prior to the husband's death each held an individual divisible interest. As between the two, and before the husband's death, the law would have considered that each owned an equal half, and not that their respective interests were consolidated into an entirety held by the two as one person. By the law of 1846, which was a re-enactment with some change of the law of 1844, the estate Mrs. Wait owned on her marriage with decedent, Justin Wait, was kept and preserved to her as her separate property after the marriage to the "same extent as before marriage." Sess. Laws 1844, p. 77–78; Rev. St. 1846, p. 340, § 25. Hence, during the husband's lifetime, and up to the act of 1855, the marriage and taking the securities in the joint names had not the effect, as matter of law, to blend the respective interests and consolidate them into one.

The preservation of the property interest of the wife as something distinct and separate is repugnant to such a blending, and inconsistent with the common-law doctrine advanced.

The act of 1855, which was passed some three years after the marriage, goes further than the earlier ones in the same direction. 2 Comp. Laws, pp. 1477, 1478.

She held her property interest as though she were sole, and the bare fact that the securities were taken in the joint names, could no more change the holding into one by entirety than it would if the parties had not been married. Indeed the tenure was just what it would have been if the parties had been unmarried.

Her right was separate and distinguishable up to her husband's death, and under the impress of the statute it continued so, and his right was therefore necessarily separate and distinguishable from hers, and so continued.

There could be no blending so long as the law kept her right distinct.

The drift of policy and opinion, as shown by legislation and judicial decisions, is strongly adverse to the doctrine of taking by mere right of survivorship, except in a few special cases, and it should not be applied except where the law in its favor is clear.

There must be a reversal of the order of the circuit court and an affirmance of the order of the probate court.

The plaintiffs in error will recover their costs of this court and of the circuit court.

The other justices concurred.

McLEOD et al. v. FREE et al.

(55 N. W. 685, 96 Mich. 57.)

Supreme Court of Michigan. June 16, 1893.

Appeal from circuit court, Kalamazoo county, in chancery; George M. Buck, Judge.

Action by Mary McLeod, personally and as executrix of the last will and testament of Stephen W. Frank, deceased, and Emory S. Frank, against John W. Free, as administrator of the estate of Abagail Frank, deceased, and Henry Frank, impleaded with Marshall Cole, Fannine O'Dell, Jessie Close, William Stewart, Edwin Roberts, Ada Cole, Emory Cole, David H. Lull, Fidelia Lull, Mary Lewis, and Stephen Frank, to reform a note, and to enjoin defendant Free from taking possession thereof. Judgment was rendered for plaintiffs, and defendants Free and Henry Frank appeal. Affirmed.

E. M. Irish, for appellants. Osborn & Mills, for appellees.

LONG, J. Stephen W. Frank and Abagail Frank, both deceased, were husband and wife. On December 28, 1889, Stephen sold all his real estate, with the exception of a village lot, to William Stewart and Edwin Roberts, his wife joining in the deeds. To secure a portion of the purchase money, notes and mortgages were taken from Roberts, and an assignment of a mortgage and notes accompanying from Stewart. The notes and mortgages and assignment were all drawn payable to Stephen and Abagail Frank. By the bill filed in this case it is claimed (1) that the notes, mortgages, and assignment were not prepared in accordance with the intention and understanding of the parties, but that all that Stephen W. Frank intended was to have them so drawn that the income should go to his wife during her life in case she survived him, and that a mistake was made by the scrivener in making them payable to the parties jointly; (2) that, if no mistake was made, then that the transaction was intended as a testamentary disposition of the property, which was revoked by the last will and testament of Stephen, prepared and executed a few days after these conveyances. The bill prays that the mortgages, notes, and assignment may be corrected in accordance with the intent of the parties, or that such instruments may be decreed to have been made as a testamentary disposition of the property; and that Mr. Free, as administrator of the estate of Abagail Frank, be enjoined from taking possession of such securities from the complainant, as executor of the estate of Stephen Frank. On the hearing below the court found that it was not intended by Stephen or understood by Abagail that she should take by such instruments more than a life interest in these securities, and that all she did take was a life estate; and that such securities are now a part of the estate of Stephen, and in the possession of Mary McLeod, as such executrix. By this decree the defendants were perpetually enjoined from taking any proceedings at law or otherwise to obtain possession of these securities, and the complainant authorized and directed to collect the same as a part of the assets of Stephen's estate, and dispose of the proceeds in accordance with the terms of his will. The defendants John W. Free, as administrator, and Henry Frank, alone appeal. The bill was taken as confessed by all the defendants, except those now appealing.

The contention on the part of the complainants is that the proofs abundantly sustain their position. It appears that on May 2, 1889, Stephen made a will. This was prior to the sale of the real estate. By the will he devised the use of substantially all the real estate to his wife during her natural life. Within a few days after he sold the real estate he directed a new will to be made. It revokes all former wills. At the time of its execution he had a small amount of personal property,—a village lot, which he willed to his daughter Mrs. McLeod,—and the securities above described. He gave his wife a life interest in the village lot, all his furniture, etc., and bequeathed to his executors in trust the remainder of his estate, to sell and convey and convert into money, the income of which was to be paid annually to his wife so long as she lived. His son Henry C., upon the death of his mother, was to be paid $100 in addition to the $2,000 or $3,000 he had already given him. Certain of his grandchildren living at his decease were each to receive $100 and his son Emory S. the sum of $2,000; and the residue, after paying the funeral expenses, for tombstones, etc., he gave to his daughter Mrs. McLeod and his son Emory S. He made his wife and his daughter Mrs. McLeod executrices of his will. On February 12, 1890, Stephen Frank died. On the 27th of that month Mrs. Abagail Frank filed a petition in the probate court for probate of the will, and, she refusing to act as executrix, the trust was assumed by the daughter Mrs. McLeod. The son Henry receipted for all that was his due under the will. On June 27th following Abagail receipted for all she claimed of the personal estate under the will, which amounted to $315.10. After this time the widow received the income from these securities, and, so far as appears by this record, never made any claim that they or any part of them belonged to her. She died December 26, 1890. These securities were found among the papers of Stephen W., and passed into the hands of Mrs. McLeod, as executrix, and were treated as a part of the estate of Stephen until after the death of his widow. In 1891, Henry Frank filed a petition in the probate court for the appointment of an administrator of the estate of his mother, and Mr. Free was so appointed. This proceeding was then commenced to declare these securities as belonging to the estate of Aba-

gail, claiming that she took the absolute title to them as survivor of herself and her husband, to whom they were jointly made. There is no controversy in the case except such as grows out of these securities, and, so far as appears, no rights of creditors are concerned. The naked question is, did the wife take these securities at the death of the husband?

The husband was the owner of the land out of which the securities grew. After they were taken, they were treated as his individual property during his lifetime. He dealt with them as such, and at his death disposed of them by his will. His wife, as it appears, always regarded them as his property during his lifetime, and after his death acquiesced in their being inventoried and treated as a part of his estate, taking and receipting for her share and interest in the estate as given her by the will, and was apparently satisfied to have the securities treated as a part of her husband's estate up to and at the time of her death. No one raised any question about it, until after her death, when the son Henry C., who was given only $100 by his father's will, made the claim that the securities belonged to his mother's estate. Counsel for defendant cites cases in his brief where it has been held by this court that a joint deed to husband and wife conveyed the estate to them by entireties, and that the right of survivorship exists in such cases, so that where one dies the other is vested with the whole estate. But this doctrine has not been applied to mortgage securities with such strictness. In Wait v. Bovee, 35 Mich. 425, it was said: "The drift of policy and opinion, as shown by legislative and judicial decisions, is strongly adverse to the doctrine of taking by mere right of survivorship, except in a few special cases; and it should not be applied except where the law in its favor is clear." In the above case the husband and wife were each possessed of considerable means, and made investments jointly, each supplying half of the funds. On the death of the husband the wife claimed the whole of the securities by right of survivorship. This right was denied, and it was said: "Our own decisions relative to the rights of husband and wife in case of united holdings of real estate afford no argument here." It is evident from the testimony given by the complainant in the present case that the scrivener in drafting the mortgage, notes, and assignment did not make them in accordance with the understanding of the parties. It is also evident from the testimony of the witnesses that Abagail never understood that she had any more right in these securities than she had in the real estate out of which they grew. The will was made within two days after they were taken, and by the will she was given a life interest in them. Equitably they were a part of the estate of the husband, and, being so treated by the parties themselves, and so understood by them, they must now be so treated, and reformed accordingly. In any event, only one-half could go to the estate of the wife under the rule in Wait v. Bovee, supra; but, under the facts shown, the whole securities must be treated as belonging to the estate of the husband. The decree of the court below must be affirmed, with costs.

HOOKER, C. J., and McGRATH and GRANT, JJ., concurred.

MONTGOMERY, J., (dissenting.) I do not think that the evidence justifies the conclusion that there was any mistake in drafting the note and mortgage.

BARTON et al. v. LOVEJOY et al.
(57 N. W. 935.)

Supreme Court of Minnesota. Feb. 1, 1894.

Appeal from district court, Crow Wing county; G. W. Holland, Judge.

Action by A. B. Barton and Jeremiah J. Howe, partners as J. J. Howe & Co., against Hannah A. Lovejoy, Frank Lovejoy, and others, to determine adverse claims to real property. From the judgment rendered Frank Lovejoy and others appeal. Affirmed.

Little & Nunn, for appellants. Leon E. Lum and Jackson & Atwater, for respondents.

BUCK, J. The plaintiffs brought this action to determine the adverse claims of the defendants to certain vacant premises situated in the counties of Cass, Itasca, and Crow Wing, in this state. It is alleged in the complaint that plaintiffs are the owners in fee of such vacant premises, and they ask that the title be determined to be in them and forever quieted, and that the defendants and each of them, be enjoined and barred from asserting any claim whatever in or to said lands. The defendants Frank L. Lovejoy, Lorin K. Lovejoy, Arthur Lovejoy, and Mary E. Winston answered, and the other defendants were in default. Mary E. Winston, in her separate answer, alleges that she is the owner of three thirty-seconds of said premises, and the other three defendants, in their answer, claim to be the owners in fee of three thirty-seconds of the premises. On and prior to January 29, 1886, the premises in question were part of the partnership property and assets of the firm of J. J. Howe & Co., but at said time the legal title to said land was held as follows: An undivided three-eighths by Sumner W. Farnham, an undivided three-eighths by James A. Lovejoy, and an undivided two-eighths by Jeremiah J. Howe, one of these plaintiffs. The firm of J. J. Howe & Co. then consisted of the partnership firms of Farnham & Lovejoy, owning a one-sixth interest in its property and business, and said J. J. Howe, who owned a two-eighths interest in its said property and business, and the firm of Farnham & Lovejoy consisted of those two persons, who each owned a half interest therein, both firms being engaged in the lumber business. Lovejoy died intestate January 29, 1886, and said J. J. Howe and O. C. Merriman and Winthrop Young were the executors of said will, which, by its terms, authorized said executors to close up and settle the said copartnership business of Farnham & Lovejoy, and to join with said Farnham in the execution of all contracts, deeds, and mortgages and other papers and instruments that might become necessary for the sale of the lands of said Farnham & Lovejoy, and for the doing of such other acts as might be by said executors deemed necessary and advisable in regard to the business of said partnership. The will was duly probated, and by its terms made the defendants who have answered the devisees of said James A. Lovejoy. At the time of the death of said Lovejoy his estate and the firm of Farnham & Lovejoy were insolvent, and the firm of J. J. Howe & Co. was largely in debt. On the 11th day of May, 1887, the plaintiffs entered into a partnership under the firm name of J. J. Howe & Co., and about the 15th day of May, 1887, said Farnham, as surviving partner of said James A. Lovejoy, proceeded to settle up the business of said firm, and to this end he sold to plaintiffs all the interest of said Farnham & Lovejoy in said firm and in the firm of J. J. Howe & Co. as it existed at the time of said Lovejoy's death, and prior to the date of said sale, for the sum of $38,000, and which sum was by said Farnham applied to the payment of the debts of said firm of Farnham & Lovejoy, and the premises so sold are a part of the copartnership property of J. J. Howe & Co., these plaintiffs. The executors of said Lovejoy, jointly with said Farnham and his wife, executed a deed to these plaintiffs, in form conveying to them the legal interest in said lands held by said Farnham & Lovejoy at the time of said Lovejoy's death. The court below found as a fact that such sale was made in good faith, for the best price obtainable, and for the best interest of said firm of Farnham & Lovejoy. The final account of the executors was duly settled in probate court, and they made return to said court that no money or property had been received by them from the assets of the firm of Farnham & Lovejoy, as the same was insolvent. It does not appear that these defendants, or any of them, or any creditor, ever in probate court or elsewhere objected to the sale made by Farnham as surviving partner to plaintiffs, nor to the transfer of the property of Farnham & Lovejoy to plaintiffs. Upon these facts the court below found for the plaintiffs, and decreed that the defendants had no right or title as against the plaintiffs.

We are of the opinion that the decision of the lower court was correct, and should be affirmed. We shall not attempt to enter into a full discussion of all the various questions discussed by the respective counsel. It is elementary that where, in case of the death of a partner, there is not enough personal property to pay the firm debts, then the surviving partner has a right to sell the real estate of the firm to do so. If he sells the real estate of the firm for the purpose of paying the firm debts, without first obtaining an order from the court, and makes such sale in good faith and for a valuable consideration, then such sale passes the equitable title in the premises to the purchaser. In this case there does not appear to have been any bad faith on the part of the surviving partner, nor that he has squandered any of the proceeds of the sale, nor in any manner diverted the consideration received from the

just payment of the partnership debts. The property seems to have been sold for its full value. The firm was hopelessly insolvent, and it was not only the right, but the duty, of the surviving partner to sell enough property to pay the debts. If he had not done this, the debts could have been collected by due process of law if there were sufficient assets, and the same property applied towards paying the firm debts. If the surviving partner sold the premises in good faith, and, as the court below found, for the best price obtainable, no injury could possibly have resulted to the defendants. Although the surviving partner, Farnham, sold the premises without an order of the court, yet the heirs have no right to come in and defeat the equitable title which passed upon the sale. The devisees or heirs in such case can be compelled to convey the legal title, or, as in this case, the court properly adjudged and decreed the title to the premises to be in the plaintiffs as against the defendants. In the case of Shanks v. Klein, 104 U. S. 18, the law is stated thus: "Real estate purchased with partnership funds for partnership purposes, though the title be taken in the individual name of one or both partners, is, in equity, treated as personal property, so far as necessary to pay the debts of the partnership, and to adjust the equities of the copartners; and for this purpose, in case of the death of one of the partners, the survivor can sell the real estate so situated; and, though he cannot convey the legal title which passed to the heirs or devisee of the deceased partner, his sale invests the purchaser with the equitable ownership of the real estate, and the right to compel a conveyance of the title from the kin or devisee in a court of equity." See, also, Hanson v. Metcalf, 46 Minn. 25, 48 N. W. 441. The power and authority which the law confers upon a surviving partner appears to be quite full and extensive for the performance of all the business necessary to a complete settlement of the concern. As against heirs or devisees of the deceased partner, he has full control of the partnership property. In this case there does not, as we have said, appear to have been bad faith on the part of the surviving partner, and this statement is strongly confirmed by the fact that the three executors joined with him in the conveyance to the plaintiffs. The answer does not allege any fraud or bad faith on the part of the surviving partner or the executors. It was his duty to proceed without unnecessary delay to settle the partnership affairs in the best possible manner for all parties interested. As his powers were commensurate with his position, and there does not appear to have been any misconduct upon his part, the judgment of the court below is affirmed.

HANSON v. METCALF et al.
(48 N. W. 441, 46 Minn. 25.)
Supreme Court of Minnesota. April 3, 1891.

Appeal from district court, Meeker county; POWERS, Judge.

P. W. Locke, E. A. Campbell, and *M. B. Koon*, for appellant. *Uri L. Lamprey*, for respondent.

VANDERBURGH, J. The plaintiff is a creditor of the late firm of M. J. Flynn & Bro., a partnership composed of M. J. Flynn, who died January 3, 1889, and the defendant Daniel Flynn, and duly recovered a judgment in his favor for the amount of his claim on the 18th day of December, 1889, against the defendant Daniel Flynn, as surviving partner. In May, 1889, Daniel Flynn, in his capacity of surviving partner, and also as an individual debtor, claiming to be insolvent, voluntarily made an assignment in pursuance of the insolvent law, partnership property in his hands having been previously attached in a suit against him as surviving partner. The assignee, who is the garnishee in this proceeding, qualified and took possession of the assigned property, including the partnership and individual assets of the assignor, and interposes the assignment as a defense to the plaintiff's application for judgment against him as garnishee. The question involved here is the alleged invalidity of the assignment. The assignment, on its face, purports to be made in behalf of the partnership,—that is to say, by "Daniel Flynn, as surviving partner of M. J. Flynn & Bro.," and by "Daniel Flynn," party of the first part, and Hamlet Stevens, the garnishee herein, as party of the second part; and transfers all "the lands, tenements, goods, chattels, choses in action, claims, demands, property, and effects of every description belonging to the party of the first part, whether the same be and appear in the name of M. J. Flynn, or M. J. Flynn & Bro., or Daniel Flynn, or otherwise, for a full and more definite description of which reference is hereby made to the inventory or inventories thereof to be made and filed under this assignment as provided by law, except such property as is by law exempt from execution, * * * in trust for the uses and purposes following, * * * after providing for the expenses of the execution of the trust." "(3) To pay and discharge in full, if the residue of said proceeds be sufficient for that purpose, all the debts and liabilities now due or to become due from said party of the first part to all his creditors, who shall file releases of their claims and debts against the said party of the first part, as by law provided, together with all interest due and to become due thereon. And if the residue of said proceeds shall not be sufficient to pay said debts and liabilities and interest in full, then to apply the same, so far as they will extend, to the payment of the said debts and liabilities and interest proportionally to their respective amounts, and in accordance with the statute in such case made and provided. And if, after payment of all costs, charges, and expenses attending the execution of said trust, and the payment and discharge in full of all the said lawful debts owing by the said party of the first part, there shall be any surplus of the said proceeds remaining in the hands of the party of the second part, then (4) to repay such surplus to the party of the first part, his executors, administrators, or assigns." By the party of the first part is meant Daniel Flynn and Daniel Flynn as surviving partner, and he brings into the assignment, for disposition in the insolvency proceedings, his individual and partnership assets for the purpose of winding up the partnership affairs, and settling its debts and liabilities as well as his own, and procuring a discharge of his partnership and individual liabilities in so far as it may be done in the proceedings.

1. The first objection to the validity of the assignment is that it was not properly acknowledged. The insolvency act (Laws 1889, c. 30, § 1) provides that "the assignment shall be made, acknowledged, and filed in accordance with and be governed by the laws of this state relating to assignments." The assignment in this instance is executed by "Daniel Flynn" and by "Daniel Flynn, surviving partner of M. J. Flynn & Bro." The certificate of acknowledgment recites that "Daniel Flynn," without further recital or description, personally appeared before the notary, and acknowledged the same "to be his free act and deed." The objection is that it is defective in not showing or certifying that it was acknowledged by him "as surviving partner" also. But the instrument was executed by but one and the same person. It shows on its face what was intended to be conveyed thereby, and the purposes thereof. The acknowledgment is the proof of its execution; and where the certificate identifies the party who alone executed the deed, and affirms that he personally acknowledged its execution, it must be interpreted to be for the uses and purposes disclosed by the instrument itself, and the omission of matter of description is not fatal. 1 Devl. Deeds, § 507; Dail v. Moore, 51 Mo. 589; Williams v. Frost, 27 Minn. 259, 6 N. W. Rep. 793.

2. Another objection to the validity of the assignment is that it does not transfer all the partnership property. A large amount of real estate stands in the name of the deceased partner, which, in equity, belonged to the partnership, and is partnership assets; and the assignment is assailed on the ground that the survivor's deed of assignment did not and could not include and transfer this property. But the deed expressly assumes to convey the same, and in case of insolvency it is clearly liable to be applied to the payment of the partnership debts, and the equitable title thereto must be deemed to be in the surviving partner for such purpose, and passes to his assignee in insolvency. It is now well settled that a surviving partner may make an assignment of the partnership estate, and this will include the partnership real estate, which so far stands on the same footing as personal property; and the assignee or purchaser can compel a conveyance of the legal title from the holder thereof. Andrews v. Brown, 21 Ala. 437; Shanks v. Klein, 104 U. S. 24; 1 Bates, Partn. § 294.

3. On the dissolution of a partnership

by death the surviving partner settles the affairs of the concern. The partnership is deemed to continue for such purpose. He alone is entitled to the possession and disposition of the assets, to enable him to discharge the debts and settle the partnership affairs. The joint creditors have the primary claim upon the joint fund in the distribution of the assets of insolvent partners, and, in case of any surplus after the payment of the partnership debts, the representatives of the deceased partner are entitled to his share thereof. In the administration of the estate the surviving partner is, therefore, to be treated as trustee for the creditors and the heirs or representatives of the deceased partner; but in all other respects he is treated as having succeeded to all the rights, interests, and property of the partnership. He alone may sue and be sued. He has the possession, control, and sole disposing power of the partnership assets. 3 Kent, Comm. 57, 64; Shanks v. Klein, supra. In the settlement of the estate the creditors have a right to insist upon the equitable rule and order of distribution above indicated; and hence the respondent claims, as a further ground of objection to this assignment, that by the terms of the trust this rule is violated, and debts due the separate creditors of the surviving partner are put on the same footing with debts due the partnership creditors, without preference for the latter. If the assignment had expressly provided that one class of creditors should be preferred to another, or that partnership property should be first applied to the satisfaction of the individual debts of one partner in the order of distribution, a different and more serious question would have been presented; but the assignment simply follows the general language of the statute on the subject. Gen. St. c. 41, § 28, subd. 3. This section is to be construed in connection with the general rules of law applicable to the distribution of partnership assets, and this is what is meant by an equal distribution of the assigned property. It would have been appropriate and more accurate to have indicated the proper order of distribution in the assignment; but the assignor evidently intended to follow the statute, to which he refers, and endeavors to conform to the general language used therein. The assigned property must be deemed to be under the control and subject to the direction of the court, and the assets may therefore be marshaled and distributed, so as to protect the rights of the partnership creditors.

4. The plaintiff also insists that under the rule in May v. Walker, 35 Minn. 194, 28 N. W. Rep. 252, and In re Allen, 41 Minn. 431, 43 N. W. Rep. 382, the assignment herein is a partial, and not a general, one, and that releases cannot be exacted as a condition of sharing in the assets unless the property of all the partners, individual as well as partnership, be surrendered, and included in the assignment, and that in this instance the separate property of the deceased partner is not brought in; but we think this case is clearly distinguishable. The plaintiff, we think, overlooks the relation between the living partner and the heirs or representatives of the deceased partner, and the nature of the title and authority of a surviving partner. The heirs or personal representatives of a deceased partner have no control over or interest in the partnership affairs or property except to require an accounting. They have none of the rights or duties of partners, and no obligations save their liability in equity to the extent of property received from their ancestor in case of the insolvency of the partnership. To that extent they occupy the *quasi* relation of sureties in respect to the remedy of the partnership creditors against them. Murray v. Fox, 39 Hun, 110, 111, and cases. The property so received by them is not partnership property, and has ceased to be the property of a partner. It passes to the heirs or representatives, subject merely to the contingency mentioned. As before stated, the surviving partner is all there is left of the partnership. He has title to the property; may collect, settle, and compromise debts. He alone is suable, and is the real party in interest in respect to demands due to or owing by the firm, and is primarily liable for all its indebtedness; and his legal title to the assets is exclusive for the purposes of administration. Daby v. Ericsson, 45 N. Y. 789; Shields v. Fuller, 65 Amer. Dec. 295, and notes. And since the recent amendments to the insolvency law it can hardly be doubted that an insolvent surviving partner is fairly embraced within its provisions, and entitled to its benefits. (*a*) A firm claiming to be insolvent, and proceeding under the insolvent act, all the members should join in the proceedings and surrender their property. But the surviving partner constitutes the partnership; and, if such partnership is insolvent, he is an insolvent, and may bring into court the assets, both partnership and individual. In re Stevens, 1 Sawy. 398–9. (*b*) By section 1, c. 30, Laws 1889, it is provided that the release of any debtor under this act shall not operate to discharge any other party liable as surety, guarantor, or otherwise, for the same debt. Doubtless the voluntary discharge of the surviving partner by a partnership creditor would, of itself, operate to discharge the collateral liability of the personal representatives of the deceased partner. Murray v. Fox, supra. But such was not the effect of a discharge under the national bankrupt act, and the rule in insolvency proceedings here is settled by the provision above quoted. The discharge from the partnership debts is a discharge of the primary liability of the surviving partner, but does not operate to release the estate of the deceased partner from liability. In re Stevens, supra. We think, therefore, the assignment must be sustained. The judgment is reversed, and the case will be remanded to the district court, with directions to discharge the garnishee.

WESTERN GRANITE & MARBLE CO v. KNICKERBOCKER et al. (No. 15,196.)

(37 Pac. 192, 103 Cal. 111.)

Supreme Court of California. June 15, 1894.

Commissioners' decision. Department 2. Appeal from superior court, Santa Clara county; W. G. Lorigan, Judge.

Action by the Western Granite & Marble Company against Eugene Knickerbocker and others to enjoin the erection of a fence. From a decree granting the injunction, and from an order denying a new trial, defendants appeal. Affirmed.

William L. Gill, for appellants. D. W. Burchard and Francis E. Spencer, for respondent.

TEMPLE, C. The defendants appeal from the judgment, and from a refusal of a new trial. The appellants and respondent own adjoining lots in the city of San Jose. The complaint contains two counts. The first describes plaintiff's lot, and avers that it has erected a building thereon for its offices, which building has six windows in the northerly wall, through which, only, light and air are or can be admitted into that portion of the building, and, if such light and air be materially obstructed, said portion of plaintiff's building will become useless. Plaintiff has been using the building and office for more than six months. Defendant owns the adjoining lot which he occupies as a residence, but, until the grievances complained of, has never obstructed the passage of light and air over that part of his premises to plaintiff's building, and has no use whatever for that portion of his premises whereby said light and air would be obstructed. Nevertheless, on the 19th of June, 1891, defendant commenced to build along the division line a solid board fence, 20 feet high, in such manner as to prevent the passage of light and air into said windows. That the defendant has not obtained the permission of the city council to build such fence, nor has plaintiff ever consented thereto. That defendant will build the fence unless enjoined, and plaintiff will suffer irreparable injury therefrom. The second count adds an allegation that the building of the fence is wanton and malicious. The court found the facts as stated in the first count of the complaint, but did not find that defendant was acting wantonly or maliciously.

The doctrine that a proprietor may by user acquire an easement over adjoining land for the passage of light and air does not prevail in this country, and, if it did, the facts stated in the complaint would be insufficient to show such easement. Indeed, no facts are averred or found which would give plaintiff any right whatever in the lands of defendant. The sole ground, therefore, upon which the judgment is based, is that the proposed structure is unlawful, and, as it interferes with the comfortable enjoyment of plaintiff's property, it is a private nuisance, which may be enjoined or abated. It is claimed to be unlawful because it violates the provisions of the act of the legislature passed March 9, 1885, entitled "An act regulating the height of division fences and partition walls in cities and towns." The act consists of three sections, the first two of which read as follows:

"Section 1. It shall be unlawful for any owner of real property in any city or town in this state, or any person having possession thereof, to construct, erect, build, permit or maintain upon such premises any fence or partition wall which shall exceed ten feet in height, without first obtaining a permit to do so from the board of supervisors or city council of the city or town in which said fence or wall is to be erected and maintained.

"Sec. 2. No permit to construct or maintain any fence or division partition wall having a greater height than ten feet, shall be granted by the board of supervisors or city council of any city or town in this state, unless the person applying therefor, and to whom such permit is granted, shall first obtain and present to such board of supervisors or city council the written consent of the person or persons having ownership or possession of the adjoining premises affected thereby: provided, that where such fence or wall is constructed around a public garden, or place of public resort where an admission fee is charged, no signature or consent of adjacent owners shall be required."

The third section declares that a violation of section 1 shall be a misdemeanor, and provides a penalty.

It is contended that this act is unconstitutional.

1. It violates section 11 art. 11, of the constitution, which confers upon counties, cities, and towns the power to make and enforce such police regulations as are not inconsistent with general laws. This position must be that the act is not a general law. This position cannot be maintained. It operates alike upon all who are within the reason of the act. There are reasons in the nature of things why it should not affect some property.

2. It is claimed that it is unconstitutional, because it gives the owner of the adjoining property the power to prevent such a structure. If the act must be construed as rendering it unlawful for the owner to erect such a structure upon his own land, although along the line, I think it is obnoxious to this objection. Merely owning the adjoining lot does not give the proprietor an easement over the property of another for the passage of light and air; nor is it competent for the legislature to vest in such proprietor the power to prevent his neighbor from building such structures as he pleases, provided it is not a nuisance, and it is not such merely because it obstructs the passage of light and air. The legislature cannot thus create an easement in favor of certain proprietors over the lands of another, nor declare the usual

and ordinary use of property a nuisance when such use infringes upon the legal rights of no one. The court found in this case that the plaintiff's windows open towards defendant's lawn. That this portion of his premises shall be secluded and private may be a matter of great importance to defendant. That he has the right to secure such privacy, if he can, by building obstructions on his own land, has always been recognized by the courts. In Chandler v. Thompson, 3 Camp. 80, Le Blanc, J., said "that, although an action for opening a window to disturb the plaintiff's privacy was to be read of in the books, he had never known such an action maintained, * * * and that the only remedy was to build on the adjoining land, opposite to the offensive window." Washburn lays down the rule as follows: "And the cases are uniform that such adjacent owner may deprive his neighbor of the light coming laterally over his land by the erection of a wall, for instance, upon his land, within the period of prescription, although he may do it for the mere purpose of darkening his neighbor's windows." It is well settled that he may build upon his property, although the effect may be to entirely close the windows of his neighbor. But, if the statute is capable of a construction which will bring it within the legislative power, it should be so construed, rather than in a way to render it unconstitutional. The power has been conceded to the legislature to provide for and regulate the construction of division fences. It may authorize their construction upon the boundary line; that is, resting partly upon the land of the adjoining proprietor. It may provide for the character of the fence which may be thus built, so as to make it certain that the adjoining proprietor, who may be compelled to contribute to the expense, thereby secures something of value. While there are expressions in the statute that might well be understood as prohibiting a structure inclosing defendant's lot more than 10 feet high, although not on the boundary line, still the language is entirely consistent with the other view; and we should therefore presume that it was the intent of the legislature to do that which it had the power to do.

It is said that the act forbids a partition wall as well as a fence, and that, under the statute, one may not build a house on his land extending to his boundary line without the consent of his neighbor. But understanding the law as simply applying to fences or walls built upon the line, and so resting partly upon the land of the adjoining proprietor, it takes nothing from the owner, for he could build no such wall upon his neighbor's land without his consent. But I think the phrase "partition wall," in the first section, and "division partition wall," in the second, must be understood as applied to a wall which is merely a fence. "Partition wall" is not a phrase which in legal technology is used to designate a wall used by adjoining owners as a party wall. A party wall is always, at least in this state, such by agreement. A division fence is provided for in our Code (section 841, Civ. Code). Confining the operation of the statute to division fences, I see no objection to a requirement that they shall not be of such a character as to injure the neighboring proprietor. If my neighbor enjoys the privilege of resting his fence upon my land, he may justly be prevented from inflicting special injury upon me by the structure which partly belongs to me, and to the expense of building which I may be made to contribute. The finding is to the effect that plaintiff's building is about 18 inches from the line; that defendant Knickerbocker commenced the construction of the fence "upon his said premises and upon said boundary line." The evidence shows that there was already upon the boundary line a division fence, and that defendant cut into this old fence to let in the frame work of his new structure, which is therefore upon the old fence, and partly upon the land of plaintiff. By the decree, defendant is enjoined from erecting or maintaining any fence more than 10 feet high "on the division line," and is required to remove all that portion of the "division fence which is more than ten feet high," and he is enjoined from "obstructing the light and air coming from his said premises into the windows of said granite and marble company by any division fence or wall more than ten feet high." This shows how the trial court regarded the statute. The judgment has no effect upon the right of defendant to erect any kind of a structure upon his own land. I think the judgment and order should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

KEATING v. SPRINGER.

(34 N. E. 805, 146 Ill. 481.)

Supreme Court of Illinois. June 19, 1893.

Appeal from appellate court, First district.

Action by Warren Springer against Michael Keating for use and occupation. Plaintiff obtained judgment, which was affirmed on appeal. 44 Ill. App. 547. Defendant appeals. Reversed.

The other facts fully appear in the following statement by MAGRUDER, J.:

On March 15, 1884, appellee executed a written lease of certain premises to appellant for the period, extending from April 1, 1884, to April 1, 1894, for $30,000, payable in monthly installments of $250 each. The premises are described in the lease as follows: "All those premises situated * * * in the city of Chicago, * * * known and described as follows, to wit: 'The basement of the building known as Nos. 201, 203, and 205 So. Canal street, Chicago, being a space 50 feet by 70 feet, more or less; also the store floor of part of said building, and known as Nos. 201 and 203 So. Canal street, being a space 50 feet by 50 feet, more or less; also a space in the yard at the rear of said building, commencing at the N. W. quarter of said building, then west 25 feet, then south 25 feet, then east 25 feet, to building,—together with steam power not to exceed ten horse power, said steam power to be furnished ten hours per day, Sundays and holidays excepted. Said premises hereby leased to be used and occupied as a marble works and kindred business, and in no manner as to damage or interfere with tenants of adjoining property.'" The lease contained, among others, the following provisions, to wit: "Party of the first part [Springer] shall not build at the rear of said premises nearer than twenty-five feet, and no obstruction higher than six feet shall be placed in such manner as to obstruct light to said premises, and party of the second part shall at all times have the use and free access through all now existing alleys leading to rear of said premises." Appellant occupied the premises under the lease from its date until July 17, 1888, when he left them. The building was a two-story and basement frame building, fronting east on Canal street, between Van Buren street, on the south, and Jackson street, on the north, and having a depth of 50 feet. It had windows in the front and rear, and on the north and south sides. The territory around it was practically vacant at the date of the lease. There was then no building to the south of it nearer than 40 or 50 feet, except, perhaps, a small shed; none in the rear or to the west of it nearer than about 60 feet; and none to the north nearer than 30 feet, or more. There were some sheds and platforms to the north, and some rubbish to the west, but nothing to obstruct the light needed for cutting and polishing marble. In the space on the south there was an alley running west from Canal street to Clinton street, connecting with which was another alley running north and south in the rear of the premises in question. In 1885 appellee erected a large brick building, called the "Springer Building," having five stories above the basement, fronting 26 feet on Canal street, and having a depth of 75 feet. Its north wall was immediately against the south wall of appellant's building, called the "Keating Building;" and it extended 25 feet further west than the Keating building, the extension of 25 feet being on the south line of the space in the rear of the Keating building, as described in the lease. The proof tends to show that appellee dug excavations on the lines of the alleys, and built boiler and machine shops in the rear of the Keating building; and placed obstructions of various kinds in the alleys and in the space to the rear of the Keating building. From the differences growing out of these transactions various suits have resulted. Appellee brought against appellant a suit in assumpsit for the use and occupation of said premises, to which nonassumpsit was pleaded; a suit upon a note alleged to have been given for rent, to which pleas of nonassumpsit and set-off were filed; three proceedings of distress for rent, in which the general issue and certain special pleas of set-off and general replications to the latter were filed. And appellant brought an action in case against appellee to recover damages for cutting off his light by the erection of the Springer building and other obstructions, to which the plea of not guilty was filed. The said special pleas set up violations of the covenants of the lease by alleging: that the light was shut off on the south and in the rear of the Springer building, and its extension to the west, and by the erection of shafting and machinery and other obstructions more than 15 feet high; and that the alleys were closed up by the placing therein of iron boilers, castings, engines, building materials, etc.; and that steam power was not furnished, etc. The suit for use and occupation was begun in the circuit court of Cook county. Of the other suits, one was begun in said circuit court, one in the superior court of said county, and three in the county court of said county. The four suits last named were transferred by proper order to the circuit court, and an order was entered by the latter court in the suit for use and occupation consolidating the other suits with it. A stipulation was entered into between counsel that there should be one trial, which should determine the matters in controversy in all the suits. A jury was waived, and by agreement the consolidation cause was submitted for trial before one of the judges of the circuit court, without a jury. Upon the trial, the plaintiff, Springer, introduced the written lease, and proved the amount of unpaid rent due thereon from October, 1887, to July 17, 1888. A large mass of evidence was introduced by the defendant, Keating, principally in support of the contentions that buildings and obstructions

were erected in the rear of the premises nearer than 25 feet, and that the use of the alleys and free access through the same were interfered with and cut off. In contradiction of this evidence a large number of witnesses were examined by the plaintiff. At the close of his testimony thus introduced, the plaintiff offered in evidence, and the court received, over defendant's objection and exception, the proceedings in a forcible entry and detainer suit begun by Springer against Keating before a justice of the peace on April 25, 1888, wherein the complainant alleges that Springer was entitled to the possession of said premises, and that Keating unlawfully withholds the same, wherein judgment was rendered in favor of Springer on May 8, 1888, and an appeal was taken and perfected to the superior court, which appeal was dismissed on July 9, 1888, and a further appeal was taken and allowed to the appellate court upon filing bond and bill of exceptions within 20 days. On October 3, 1891, judgment was entered by the circuit court in favor of Springer for $2,907.50 against Keating, and in the suit of Keating against Springer the latter was found not guilty. This judgment has been affirmed by the appellant court, (44 Ill. App. 547,) and the case is brought here by appeal.

Haneey & Merrick, for appellant. Allan C. Story, for appellee.

MAGRUDER, J. (after stating facts). In this case many questions of fact and law are discussed by counsel in their briefs, but the record is not in such shape as to authorize us to consider any of these questions, except that which arises out of the refusal of the trial court to admit certain offered evidence, as hereinafter stated. The trial was, by agreement, before the court, without a jury, and resulted in a judgment for the plaintiff, which has been affirmed by the appellate court. The judgment of the latter court is conclusive as to the findings of fact. No "written propositions to be held as law in the decision of the case" were submitted to the court on the trial below by either side, in accordance with section 42 of the practice act; and hence no question of law is presented for our determination, unless the errors assigned as to the admission or exclusion of evidence necessarily involve the consideration of such a question. Bank v. Haskell, 124 Ill. 587, 17 N. E. 59; Myers v. Bank, 128 Ill. 478, 21 N. E. 580; Hall v. Cox (Ill. Sup.) 33 N. E. 33.

The evidence tends to show that a strong light is necessary for such business of manufacturing and polishing marble, as appellant was engaged in, and that the demised premises were selected by the appellant for that business mainly because of their freedom from surrounding obstructions to the supply of light. Accordingly, the defendant below offered to prove that the erection of the Springer building on the south side of the Keating building prevented the entry of light into the latter from the south and west. Upon objection by the plaintiff, the court refused to receive the testimony, and an exception was taken to its rulings by the defendant. The action of the trial court was correct, if there is no express covenant or agreement in the lease obligating the landlord to permit the light to pass over the south lot into the leased premises. The English doctrine is that, "if one who has a house with windows looking upon his own vacant land sell the same, he may not erect upon his vacant land a structure which shall essentially deprive such house of the light through its windows." Washb. Easem. marg. p. 492, par. 5. This doctrine, however, does not prevail in the majority of the American states. It is held to be inapplicable in a country like this, where the use, value, and ownership of land are constantly changing. Air and light are the common property of all. The owner of a lot cannot be presumed to have assented to an encroachment thereon if he has permitted the light and air to pass over it into the windows of his neighbor's house, situated upon the adjoining lot. The actual enjoyment of the air and light by the latter is upon his own premises only. The prevalent rule in the United States is that an easement in the unobstructed passage of light over an adjoining close cannot be acquired by prescription. 2 Woodf. Landl. & Ten. marg. p. 703, and notes; 1 Tayl. Landl. & Ten. §§ 239, 380, and notes; Keats v. Hugo, 115 Mass. 204; Mullen v. Stricker, 19 Ohio St. 135. In the early case of Gerber v. Grabel, 16 Ill. 217, this court held that such a right might be so acquired; but in the later case of Guest v. Reynolds, 68 Ill. 478, the Gerber Case was, in effect, overruled, and it was held that "prescription right, springing up under the narrow limitation in the English law, to prevent obstructions to window lights," "cannot be applied to the growing cities and villages of this country without working the most mischievous consequences, and has never been deemed a part of our law." It is established by the weight of American authority that a grant of the right to the use of light and air will not be implied from the conveyance of a house with windows overlooking the land of the grantor; and that, where the owner of two adjacent lots conveys one of them, a grant of an easement for light and air will not be implied from the nature or use of the structure existing on the lot at the time of the conveyance, or from the necessity of such easement to the convenient enjoyment of the property. Keats v. Hugo, supra; Mullen v. Stricker, supra; 1 Wood. Landl. & Ten. § 209, pp. 422–424, and note; Morrison v. Marquardt, 24 Iowa, 35. "A grant by the owner of two adjoining lots of one of them does not imply the right of an unobstructed passage of light and air over the other." 2 Woodf. Landl. & Ten. marg. p. 703, and note. "The law of implied grants and implied reservations, based upon neces-

sity or use alone, should not be applied to easements for light and air over the premises of another." Mullen v. Stricker, supra; Haverstick v. Sipe, 33 Pa. St. 368; Keiper v. Klein, 51 Ind. 316. It follows that a landlord will not be liable for obstructing his tenant's windows by building on the adjoining close, in the absence of any covenant or agreement in the lease forbidding him to do so. Myers v. Gemmel, 10 Barb. 537; Palmer v. Wetmore, 2 Sandf. 316; Kelper v. Klein, supra, 2 Woodf. Landl. & Ten. marg. p. 703, and note.

But the authorities all agree that the right to have the light and air enter the windows of a building over an adjoining lot may exist by express grant, or by virtue of an express covenant or agreement. Hilliard v. Coal Co., 41 Ohio St. 662; Brooks v. Reynolds, 106 Mass. 31; Keats v. Hugo, supra; Morrison v. Marquardt, supra. The question then arises whether the erection of the Springer building could have been regarded as a violation of the express terms of the lease, if proof had been admitted showing that it obstructed the light necessary to carry on the business. The lease contains the following provision: "Party of the first part shall not build at the rear of said premises nearer than 25 feet, and no obstruction higher than six feet shall be placed in such manner as to obstruct light to said premises." The meaning of the word "premises," as here used, is not to be restricted to the Keating building alone, but embraces also the space in the rear thereof. The lease speaks of "all those premises * * * described as follows;" and then mentions, as constituting those premises—First, the basement; second, the store floor; "also a space in the yard in the rear," 25 feet deep. The space in the rear is as much a part of the premises demised as the basement and the store floor. Therefore the appellee agreed that he would not build nearer than 25 feet to the west line of the demised space west of the Keating building, which space was 25 feet wide from east to west. The Springer building was 75 feet deep, while the Keating building was only 50 feet deep. It follows that the extension of the former west of the rear of the latter was along the south line of said space in the yard at the rear. The north wall of the Springer building did not extend further west than the west line of said space in the yard, and consequently the whole of the Springer building was south of the demised premises; hence we think counsel for appellee is right in the contention that no part of that building can be considered as an obstruction placed in the rear or to the west of the premises leased to appellant. But we cannot agree with counsel in so construing the language of the provision as to limit it to obstructions placed in the rear. The landlord does not agree that no obstruction higher than six feet shall be placed in the rear in such manner as to obstruct light to said premises. His agreement is that no obstruction higher than six feet shall be placed, whether to the north or to the west or to the south, in such manner as to obstruct light to said building; that is, to said space in the rear, as well as to said building. The Springer building—a brick structure, five stories high—was so constructed that its north wall joined the south wall of the Keating building, and the south line of the space in the yard at the rear thereof. In view of the express provision in the lease, as above quoted and construed, we are of the opinion that the defendant below was entitled to prove, if he could, that the Springer building was an obstruction placed in such manner as to obstruct light to said premises, and that the trial court should have admitted the proof upon that subject when offered.

It is claimed, however, that the offered evidence was properly rejected, because this suit is for rent accruing during a period while the tenant was in possession. In order to constitute an eviction, it is not necessary that there should be an actual physical expulsion Acts of a grave and permanent character, which amount to a clear indication of intention on the landlord's part to deprive the tenants of the enjoyment of the demised premises, will constitute an eviction. Hayner v. Smith, 63 Ill. 430. If the acts of the landlord are such as merely tend to diminish the beneficial enjoyment of the premises, the tenant is still bound for the rent, if he continues to occupy the premises. Unless he abandons the premises, his obligation to pay the rent remains. Skally v. Shute, 132 Mass. 367. We said in News Co. v. Browne, 103 Ill. 317: "The rule is well settled that the wrongful act of the landlord does not bar him from a recovery of rent, unless the tenant by such act has been deprived in whole or in part of the possession, either actually or constructively, or the premises rendered useless. Edgerton v. Page, 20 N. Y. 284; Halligan v. Wade, 21 Ill. 470; Leadbeater v. Roth, 25 Ill. 587." To "evict" a tenant, according to the original signification of the word, is to deprive him of the possession of the land. But the landlord, without being guilty of an actual physical disturbance of the tenant's possession, may yet do such acts as will justify or warrant the tenant in leaving the premises. The latter may abandon the premises in consequence of such acts, or he may continue to occupy them. If he abandons them, then the circumstances which justify such abandonment, taken in connection with the act of abandonment itself, will support a plea of eviction, as against an action for rent. If, however, the tenant makes no surrender of the possession, but continues to occupy the premises after the commission of the acts which would justify him in abandoning them, he will be deemed to have waived his right to abandon, and he cannot sustain a plea of eviction by showing that there were circumstances which would have justified him in leaving the premises; hence it has been held that there cannot be a constructive eviction

without a surrender of possession. It would be unjust to permit the tenant to remain in possession, and then escape the payment of rent by pleading a state of facts which, though conferring a right to abandon, had been unaccompanied by the exercise of that right. Edgerton v. Page, supra; Boreel v. Lawton, 90 N. Y. 293; De Witt v. Pierson, 112 Mass. 8; Warren v. Wagner, 75 Ala. 188; Wright v. Lattin, 38 Ill. 293; 1 Tayl. Landl. & Ten. (8th Ed.) §§ 380, 381, and notes; Wood, Landl. & Ten. (2d Ed.) § 477, pp. 1104–1106; Alger v. Kennedy, 49 Vt. 109; Scott v. Simons, 54 N. H. 426; Jackson v. Eddy, 12 Mo. 209. But though the tenant will not be allowed to plead eviction as a bar to the recovery of rent where he has remained in possession after the performance of the acts which would have justified him in leaving the premises, yet he is not for that reason without remedy. In those states where the doctrine of recoupment is recognized, he may recoup such damages as he may have sustained by reason of the acts of the landlord, against the rent sought to be recovered. 1 Tayl. Landl. & Ten. § 374; 2 Tayl. Landl. & Ten. § 631; 2 Wood, Landl. & Ten. § 477, p. 1107; Edgerton v. Page, supra; Warren v. Wagner, supra. Taylor, in his work on Landlord and Tenant, (section 631,) says: "By the law of recoupment, as now established in many of the United States, the tenant can avail himself, as a defense pro tanto to an action of debt for rent, of the landlord's breach of his covenants." The doctrine of recoupment is recognized in this state, and has been applied in proceedings begun by the issuance of distress warrants, and in actions for rent. Wright v. Lattin, supra; Lindley v. Miller, 67 Ill. 244; Lynch v. Baldwin, 69 Ill. 210; Pepper v. Rowley, 73 Ill. 262. In Lynch v. Baldwin, supra, where the landlord had issued a distress warrant, we said: "As to recouping damages for any loss or injury sustained by the tenant, we have no doubt that it may be done, as they grow out of the same transaction. The object of this inquiry is to ascertain the amount of rent due; and, if the acts of the landlord impaired the value of the use of the premises, then the tenant should not pay the same rent as if the landlord had done no act to reduce such value." In Pepper v. Rowley, supra, which was an action to recover rent due under a lease, we said: "If there has been a breach of any covenant contained in the lease, whatever damage appellee has sustained in consequence thereof may be recouped in this action from the amount of rent due under the lease." In the case at bar the consolidated proceeding not only includes a suit for rent, but also several proceedings begun by the issuance of distress warrants; and the stipulation permits the defendant to introduce, under the general issue, "any defense and also any set-off, whether matter of contract or tort, that he may have, in the same manner * * * as if specifically pleaded." We therefore think that the offered testimony as to the effect of the erection of the Springer building upon the supply of light should have been received, in order that any damages which the defendant may have sustained thereby might be recouped in reduction of the amount of recovery, and that defendant was not precluded from showing such damages by his failure to surrender possession at an earlier date.

Even if the offered testimony was not admissible as tending to show damages by way of recoupment, it was competent, under the declaration in the action brought by Keating against Springer, to recover damages for cutting off the light by the erection of the Springer building. Under the stipulation, not only were the suits brought by Springer to be tried together, but also with them was consolidated for trial at the same time the action in case which Keating brought against Springer. It is well settled that, although the omission of the landlord to perform his covenants may not amount to an eviction, nor operate as a bar to his claim for rent, yet the lessee has his remedy by an action to recover damages for a breach of the covenant. Warren v. Wagner, supra; News Co. v. Browne, supra; Lounsbery v. Snyder, 31 N. Y. 514; Wright v. Lattin, supra; Royce v. Guggenheim, 106 Mass. 201; 1 Tayl. Landl. & Ten. §§ 379, 381, and notes; 2 Wood, Landl. & Ten. § 477, p. 1107.

It is furthermore claimed by the appellant that all the matters set up in defense or as ground of recovery by the defendant in the present consolidated suits were extinguished by the judgment in the forcible detainer suit, and that said judgment operates as res judicata, so as to bar all appellant's rights of recovery or recoupment. We are unable to yield our assent to this view. The judgment in forcible entry and detainer is conclusive only as to the right of possession, and, in a certain class of cases, as to the existence of the relation of landlord and tenant between the parties, and as to the tenant's wrongful holding over. Doty v. Burdick, 83 Ill. 473; Norwood v. Kirby, 70 Ala. 397; Hodgkins v. Price, 132 Mass. 196; 8 Amer. & Eng. Enc. Law, p. 176. It was said, in Robinson v. Crummer, 5 Gilman, 218, that "damages are not recoverable in this action, but the only judgment for the plaintiff is that he have restitution of the premises," etc. For the error committed in the refusal to receive the evidence offered by the defendant as hereinbefore mentioned, the judgments of the appellate and circuit courts are reversed, and the cause is remanded to the circuit court for further proceedings in accordance with the views herein expressed.

DILL v. BOARD OF EDUCATION OF CITY OF CAMDEN.

(20 Atl. 739, 47 N. J. Eq. 421.)

Court of Chancery of New Jersey. Nov. 6, 1890.

Heard on bill, answer, and proofs.

T. B. Harned and Charles Van Dyke Joline, for complainants. William H. Jess and Samuel W. Beldon, for defendants.

PITNEY, V. C. The complainants (mother and daughter, the latter an infant) are the owners of a house and lot situate on the south side of Chestnut street, in the city of Camden, about 45 feet east of Newton avenue, and ask the court to enjoin the defendants from erecting a schoolhouse on land immediately adjoining their lot on the west. The defendants are the board of education of the city of Camden, and, as such, have jurisdiction over and charge of all the public school buildings and grounds in said city, and have contracted to build, and before the interposition of the court herein were about to erect, a large school building in the position mentioned, which, if erected, would almost touch the westerly line of the complainants' lot, and would be in close proximity to the dwelling standing thereon. The allegation and claim of the complainants is that the place where the building is to be erected is a public street in the city of Camden, and that they have the right to have it kept open and free from obstruction, as well for purposes of access to and from their lot, as also for light, air, and ventilation. The question litigated was whether or not the place in question is at this time, or ever has been, a public street; or, if not a public street in fact, whether or not the complainants have not in it the same rights as if it were a public street. Both parties claim title to their several holdings under Sarah Kaighn, who became seised of an undivided interest in the entire block of land, of which the premises in question are a part, upon the death of her father, James Kaighn, some time prior to the year 1812. He seems to have died seised of a large tract of land in that neighborhood, which, shortly after his death, was laid out into streets and called "Kaighnton," and in 1812 was partitioned among his children, and in that partition the block in question, bounded north by Chestnut street, east by Broadway, south by Kaighn's avenue, and west by Fourth street, was allotted to Sarah Kaighn. This block was bisected diagonally by a street called "Newton Avenue," running north-east and south-west, and it is the part east of Newton avenue with which we have to do. This part was again, during Sarah Kaighn's ownership, bisected by an alley or street, 20 feet wide, running east and west, called "Sycamore Street," now in use, and about the location of which there is no dispute. The part north of Sycamore street was again bisected by an alley or street, 20 feet wide, running north and south, which has never been wholly opened to the public, or, if ever opened, has not been kept open and used as a street, and the true location of which was one of the matters in dispute at the hearing. The recorded deeds from Sarah Kaighn for portions of the north part of the block in question indicate and tend to prove that it was at some time laid out into lots on a map, with the alleys in question plotted upon it, but it was admitted at the hearing that no copy of such map could now be found. It is clear that some time prior to 1819 so much of the block in question as lies north of Sycamore street was divided, on paper, into eight lots, seven of which had a frontage of 40 feet each on Broadway, and numbered, commencing with Sycamore street, 13, 14, 15, 16, 17, 18, and 19, which last was on the corner of Broadway and Chestnut, and the eighth, numbered 20, is the lot now owned by the defendants. The defendants produce a certified copy of the record of a deed dated May 20, 1819, made by Sarah Kaighn to John Hopple, by which she conveys to him as follows: "The four following described lots of ground, situate in the Kaighnton aforesaid, designated 'Sarah Kaighn's Square No. 7,' and marked in the plan thereof 'Nos. 13, 14, 15, & 16,' bounded southward by a twenty-feet wide alley, westward by other ground of said Sarah Kaighn, northward by lot No. 17, and eastward by the Woodbury road, [Broadway,] leading from thence to Cooper's Ferries, containing in breadth, north and south, one hundred and sixty feet, making four lots, each forty feet front on said road, and in length, east and west, one hundred and eighty feet, with ingress, egress, and regress to and along the said alley and all the lanes, etc., belonging to Kaighnton." It will be observed that in this deed there is no mention of a lane or alley on the west side of these four lots. Under the date of the 8th of March, 1821, Sarah Kaighn made a deed to Joseph, John, and John M. Kaighn, Joseph Boggs, and Joseph B. Cooper, five persons, as trustees, of a portion of this block, described as follows: "All that lot of ground No. 20, situate in Kaighnton aforesaid, on subdivision of Sarah Kaighn square No. 1, beginning at the angle of a twenty-feet wide alley, and the Cooper Creek road [now known as "Newton Avenue;"] thence by the north side of said alley [now known as "Sycamore Street"] eastward to the corner of another twenty-feet wide alley, [the alley in dispute;] thence northward by the west side of said alley to the south side of Chestnut street [*sic*] till it intersects the eastward line of said road, [Newton avenue;] thence south-westerly by said road to the place of beginning." There is a plain hiatus in this description, and there should be interpolated after the words "Chestnut street" these words: "Thence westwardly along Chestnut street." It will be observed that no distances are given in this description. The deed declared that the grantees should hold the premises in trust for the purposes of permitting the freeholders of the town of Kaighnton to erect upon the lot conveyed a school-house and other buildings necessary and proper for the maintenance of a school, etc., and that the building so to be erected shall be used to keep open a school forever. Upon this lot, in 1856, the school authorities erected a school-house, which

has been maintained ever since; and the one now proposed to be erected is located between such school-house and Chestnut street. Under the date of the 10th of March, 1821, two days after the making of the school-lot deed, Sarah Kaighn made separate deeds to her brother Joseph Kaighn for lots Nos. 18 and 19 in that subdivision, which, though dated two days later than the school-lot deed, were in fact acknowledged and delivered on the same day as that deed. The description of lot No. 19 in its deed is as follows: "Beginning at the corner of the road called 'Broadway and Chestnut Street,' in Kaighnton aforesaid; thence westward by Chestnut street two hundred feet to a twenty-feet wide alley; thence southward by said alley forty feet to the corner of lot No. 18; thence eastwardly by said lot two hundred feet to Broadway," etc., "marked in the plan of Sarah Kaighn's square No. 1 'No. 19,' * * * with ingress, egress, and regress to and along Broadway and said alley, and all the streets, lanes, alleys, and passages belonging to Kaighnton aforesaid." The deed for lot No. 18 calls for the alley on the west end, and the same language is used.

The reference in these deeds to a plan containing subdivisions of Sarah Kaighn's share in her father's estate seems to establish the actual existence of the map. It will be observed that in these deeds, namely, that for the school lot and those for lots Nos. 18 and 19, is found the first mention of the alley in question running north and south from Chestnut street to what is now known as "Sycamore Street;" and, as no distances along the streets are given in the deed for the school lot, it seems to me that the distance of 200 feet from Broadway along Chestnut street, given in the deeds for lots Nos. 18 and 19, must, as between the parties to the conveyances of March, 1821, conclusively locate that alley as commencing at Chestnut street, with its easterly side 200 feet west of Broadway. And this was finally, in substance, conceded by the defendants at the hearing, although the laying out of the lots lying south of Nos. 18 and 19, with a depth from Broadway of only 180 feet, would seem to indicate that Miss Kaighn at one time contemplated the locating of the alley 20 feet further east, and although in point of fact there has, for many years, been an alley running northwardly from Sycamore street about half-way through to Chestnut street, in accordance with this latter plan. In 1823 Joseph Kaighn, the grantee of lots Nos. 18 and 19, conveyed them to Joseph Boggs, for a valuable consideration, using the same description, calling for the alley, as had been used in the two deeds from Sarah Kaighn to him of March 10, 1821, and referring to that deed; and it will be here observed that both Joseph Kaighn and Joseph Boggs were trustees in the school-lot deed. Joseph Boggs died, (just when does not appear,) and his heirs, in 1843, 13 years before the school-house was built, subdivided lots 18 and 19 (which, it will be remembered, had, when combined, a frontage of 80 feet on Broadway and 200 feet on Chestnut street,) which subdivision is shown on a map made by the counsel of both sides and exhibited for both parties at the hearing. By that subdivision they divided the two lots in question, Nos. 18 and 19, first into two parts, making two lots, 100 feet front each on Chestnut street, and the westward half of these two lots they again divided into four lots of 25 feet front each on Chestnut street and 80 feet deep. The most westward of these lots (the one nearest the school-lot, being lot No. 10, in the Boggs subdivision) was conveyed by deed of April 4, 1843, to Francis Boggs, by his brothers and sisters, and is therein described as follows: "Beginning at the north-west corner of a twenty-feet wide alley and Chestnut street, in the city of Camden; thence eastward twenty-five feet to the corner of lot No. 11; thence southward by lot No. 11 eighty feet to the corner of lot No. 11; thence westward twenty-five feet to a corner on the line of vacant land; thence north, and parallel with said alley, eighty feet to the place of beginning." This description is somewhat blind. The call for the north-west corner of the alley and Chestnut street, as I construe the words "north-west," was an impossible call. There was no such corner. The course of Chestnut street was nearly due east and west, and the alley was situate wholly to the south of it. If the word "north" is omitted, and we construe the call to be for the west corner of Chestnut street and the alley, we include the alley in the lot conveyed, which seems an unreasonable result. It is also difficult to understand why the word "parallel" was predicated of a line which was coincident with one side of the alley, whether we locate it 180 or 200 feet west of Broadway. These peculiarities in the description of the deed to Francis Boggs do not, however, seem to me sufficient to shake the result I have arrived at as to the location of the alley in question. Francis Boggs conveyed this lot, together with lot No. 11, to Adam R. Dill, by deed dated August 25, 1866, using the same description, except that it commences at the "south-east" corner of a 20-feet alley and Chestnut street; and shortly after Dill built a dwelling upon it, the westerly side of which stands about five feet from the westerly line of the lot. The foregoing stated deeds comprise the paper title of the parties to the *locus*. No other conveyance was made by Miss Kaighn affecting it. Adam R. Dill devised the lots to the complainants. Before the year 1856, when the school authorities erected the school-house, the school-house lot had never been inclosed, but had laid open to common with the alley, being covered with brush and briars, and crossed in all directions by all persons at their pleasure. At or shortly after the erection of the school-house the trustees inclosed the lot surrounding it, including the alley, by a common board fence six or eight feet high, on all sides, and have kept it inclosed ever since. The part of it covered by the alley called for in the deeds has not been built upon, and the only use made of it has been for a play-ground for the school-boys. The true original location of the easterly fence, or "back fence," as it was called at the hearing, of this inclosure was the only question of fact which was seriously litigated at the hearing. The defendants con-

tended that this fence was erected in 1856 in its present location, which is 203 feet west of Broadway, measured along Chestnut street, and included nearly all the *locus* of the alley, and that it has been maintained in that position ever since. The complainants contended that it was at first, and for many years, and until within 20 years, located at the northerly end, 20 feet further west, and that there was a free passage along it from Chestnut street to Sycamore street up to a period within 20 years.

I do not deem it necessary to discuss the evidence at length, and content myself with saying that I think the decided weight of it is with the defendants; and I am satisfied that the fence has stood in its present position for nearly 34 years. Being satisfied that the fence has been in its present position for at least 33 years, I must hold that the defendants are entitled to the benefit in law of such inclosure for that period of time. No disability on the part of any owner of complainants' lot is alleged until the death of Adam R. Dill, which occurred in February, 1889.

Two questions arise upon this state of facts: *First*. What rights in the alley arose to the owner of complainants' lot out of the language used in the several deeds of March 8 and 10, 1821? *Second*. What is the effect upon those rights of the inclosure of the alley by the school authorities, and its use as a play-ground by the school children? With regard to the first question, I think it clear, in the first place, that the effect of the deeds was to carry the title to each of the grantees of the deeds just named to the center of the alley. There is no difference in principle in this respect between the use of the word "alley" and the word "street." It was so held in Wiggins v. McCleary, 49 N. Y. 346, and the English common pleas held in Holmes v. Bellingham, 7 C. B. (N. S.) 329, that the presumption was that the title of proprietors of land abutting on a private way extended to the middle of the way. Chief Justice COCKBURN (page 336) said: "The same principle which applies in the case of a public road seems to me to apply with equal force to a private road." That seems to me a reasonable view. In the next place, the effect of the several deeds in question was to create a mutual estoppel between the parties,—the trustees of the school lot on the one part and the grantee of complainants' lot on the other, each against the other,—and in favor of both as against Sarah Kaighn, to deny that the alley in question existed. Moreover, the use made of the word "alley" in the other conveyances, the extension through the entire block of that now known as "Sycamore Street," and the description of the one in question as extending from Chestnut street to Sycamore street, shows conclusively that it was intended to be and have all the attributes of a public street. Upon the principal proposition I cite Washb. Easem. p. 170 et seq., and God. Easem. (Perk. Ed.) p. 264 et seq., and the cases there cited; and, further, Roberts v. Karr, 1 Taunt. 495, where Chief Justice MANSFIELD says: "If you [the lessor] have told me in your lease that this piece of land abuts on the road, you cannot be allowed to say that the land on which it abuts is not a road." Also Espley v. Wilkes, L. R. 7 Exch. 298, where (at page 303) Roberts v. Karr is cited with approval. In the latter case the land conveyed was described as abutting on "newly-made streets," and the chief baron (page 304) says: "Here the land is described as abutting upon 'newly-made streets,' and the case is an authority to show that the grantor is estopped from denying that the strips of land (his property) are what he describes them to be, that is to say, streets, which they cannot be unless there be a way through and along them." I further cite Parker v. Smith, 17 Mass. 413, and O'Linda v. Lothrop, 21 Pick. 292. In this case land was sold bounded on an intended street, and at page 296 the court say: "As the purchasers of the estates on each side of the *locus in quo* did not acquire a right to the soil itself, [holding a different rule in this respect from that prevailing here,] it remains to be seen whether they acquired an easement over it. There was no express grant of a right of way, nor did any way pass as appurtenant to the land granted, none being in use or in existence. If the defendant acquired an easement in the land, it must have been by implication, or on the principle of estoppel. The doctrine laid down in Parker v. Smith, 17 Mass. 413, seems to us to be a very reasonable and equitable one. That case, we think, was perfectly analogous to this; but if there be any difference, this is the stronger of the two. It was there said that 'the grantor and his heirs are estopped from denying that there is a street or way to the extent of the land on those two sides. We consider this to be not merely a description, but an implied covenant that there are such streets.' This opinion is decisive of this part of the case." The question was thoroughly discussed and the principle established in the case of Child v. Chappell, 9 N. Y. 246. The opinion of MORSE, J., (page 257,) seems to me to state the doctrine clearly and truly, and I adopt it: "Where an owner of land lays it out in lots and streets, and exhibits the streets upon a map by which he sells and conveys lots so laid out, as between him and the purchasers of such lots, the spaces so laid down upon the map as streets are dedicated as such to the public use. This I understand to be the law, and in conformity to the principles of natural justice. The mere act of selling and conveying by such a map binds the grantor to permit the land so laid down as streets to be used as such. As between the parties, their heirs and assigns, it fixes the servitude of a public way upon the land thus laid out as streets. It is perhaps unnecessary now to consider whether such a grant as between the grantor and the public would be a dedication. * * * The transaction is, however, in the first instance, strictly a private one as relates to the streets, as much as it is a private one as relates to the land actually conveyed. The right to use, and to have used, by the public, the streets laid down upon the map, has become an appurtenance to the parcel of land granted, and the same right belongs to each of the parcels granted upon the

same terms. As between the original owner of the land, and the several grantees of parcels thereof, these rights are fixed, but until the public has in some way become a party to the transaction, the whole arrangement is subject to be rescinded by the joint act of the original owner and of all those who own and have the right to represent the land sold. The principle established is that an owner of land may make any lawful disposition of it which he deems most beneficial. He may found a city, a village, or an agricultural or manufacturing community at his own free will, so far as the appropriation of his land may go to effect such purposes. He may adopt just such measures concerning his land as to his judgment may seem expedient. I suppose it would nowhere be doubted that a man owning a hundred acres of land through which there ran no highway would be at liberty to inclose it with a wall, and to erect a fenced town. He might lay out streets throughout the entire parcel, and collect a phalanx of socialists, having all the streets common and as among themselves public; as to the world beside, exclusive and private. In other words, there might be impressed upon this mass of private property, by private contract, rights, in the strictest sense of the word, analogous to the ordinary public rights of highway, and yet these rights confined to the owners and representatives of the land forming the subject of the compact, and liable to be ended and rescinded by the mutual consent of all who have an interest in the subject."

In this state the same doctrine was announced in Prudden v. Railroad Co., 19 N. J. Eq. 386, at pages 391, 392, and 394, and, although the decree in that case was reversed on appeal, the statement of doctrine referred to was not disturbed. It was reiterated by the court of errors and appeals in terms still more clear and strong in Booraem v. Railway Co., 40 N. J. Eq. 557, 5 Atl. Rep. 106. In that case the complainant sought to restrain the defendant from building a railway across lands sold by her to defendants for that purpose in such a manner as to obstruct a street not yet constructed, which was reserved in the conveyance by these words: "Together with all the right, title, and interest of the said party of the first part to the lands covered by Ogden and Palisade avenues in front of the lands above described, subject to the easement of said avenues respectively; it being understood that Ogden avenue is extended for the same width across said premises, and dedicated as a public highway." In discussing the rights of the complainant in this street the court says: "The extension of Ogden avenue across the premises was obviously intended by the parties to afford means of access to the complainant's remaining lands from the present termination of the avenue, and the language used in the deed is such as is uniformly recognized as sufficient to create an easement of a right of way *inter partes* by way of implied grant. Nor do the additional words with regard to the extension of the avenue being dedicated as a public highway impair the legal effect of the language of the deed as an implied grant of an easement. The creation of a public right to be enjoyed in future, whenever the public authorities shall see fit to adopt the extension of the avenue as a public highway, is not inconsistent with the private easement which inured to the grantee immediately from the grant. Indeed, whenever a dedication as a public highway is effected (as it usually is) by means of conveyances to private persons by reference to a proposed street over other lands of the grantor, the private rights of the several grantees precede the public right, and are the source from which the public right springs. By such conveyances the grantees are regarded as purchasers by implied covenant of the right to the use of the street, as a means of passage to and from their premises, as appurtenant to the premises granted; and this private right of way in the grantees is wholly distinct from and independent of the right of passage to be acquired by the public." I should have thought this doctrine so thoroughly settled as to require no support by citation of authority but for the case of Hopkinson v. McKnight, 31 N. J. Law, 422, cited and relied upon by the defendants' counsel. It is enough to say of that case that it is clearly distinguishable from the one in hand, and, so far as it conflicts with the doctrine now in question, has been, in effect, overruled by the case of Booraem v. Railway Co. The right to have the alley thus described forever preserved as a street is a private right, annexed as an appurtenant to the ownership of the land conveyed, and is entirely distinct from and in addition to the right of the owner as a citizen at large to use the street after it should become a public street by acceptance by the public authorities. But while it is a private right it is, in my judgment, co-extensive with the public right just mentioned, in that it goes the length of requiring that the alley should be preserved in all respects as if it were actually a public street. As between the parties against whom the estoppel acts it has all the attributes of a public street, though never in fact accepted by the public. If we inquire what those rights are, we find that they are twofold: *First*, a right of access from the abutting property, and a passage to and fro over it in all its extent; and, *second*, a right of light, air, prospect, and ventilation. These rights are quite distinct from each other, and capable of being separately exercised and enjoyed. The right of light and air and ventilation may be enjoyed fully without the least exercise of the right of access and passage. That this right of light, air, prospect, and ventilation exists is clearly established by the authorities of this and other states. It was clearly defined and established by the court of errors and appeals in this state in Barnett v. Johnson, 15 N. J. Eq. 481; and its application in that case to the case of a canal is an apt illustration of the distinctness of such right from that of access to and passage over the highway on the servient tenement. The court, in that case, says: "There are, it appears to me, two classes of rights, originating in necessity and in the exigencies of human affairs, springing up coeval with every pub-

lic highway, and which are recognized and enforced by the common law of all civilized nations. The first relates to the public passage; the second, subordinate to the first, but equally perfect and scarcely less important, relates to the adjoining owners. Among the latter is that of receiving from the public highway light and air. In the first place, has not the adjacent owner upon the '*alta regis via*,' (the ordinary public highway,) of common right, the privilege of receiving from it light and air? Universal usage is common law. What has this been? Men do not first build cities, and then lay out roads through them, but they first lay out roads, and then cities spring up along their lines. As a matter of fact and history, have not all villages, towns, and cities in this country and in all others, now and at all times past, been built up upon this assumed right of adjacency? Is not every window and every door in every house in every city, town, and village the assertion and maintenance of this right? When people build upon the public highway, do they inquire or care who owns the fee of the road-bed? Do they act or rely upon any other consideration except that it is a public highway, and they the adjacent owners? Is not this a right of universal exercise and acknowledgment in all times and in all countries, a right of necessity, without which cities could not have been built, and without the enforcement of which they would soon become tenantless?"

The same doctrine has been established after fierce and protracted litigation in New York in the Elevated Railway Cases. Story v. Railroad Co., 90 N. Y. 122; Lahr v. Railroad Co., 104 N. Y. 268, 10 N. E. Rep. 528. Chief Justice RUGER, (at pages 288, 289,) in stating the result of the authorities says: "That abutters upon a public street, claiming title to their premises by grant from the municipal authorities, which contains a covenant that a street be laid out in front of such property, * * * acquire an easement in the bed of the street for ingress and egress to and from their premises, and also for the free and uninterrupted passage and circulation of light and air through and over such street, for the benefit of property situated thereon; * * * that the erection of an elevated railroad, the use of which is intended to be permanent, in a public street, and upon which cars are propelled by steam-engines, generating gas, steam, and smoke, and distributing in the air cinders, dust, ashes, and other noxious and deleterious substances, and interrupting the free passage of light and air to and from adjoining premises, constitutes a taking of the easement, and its appropriation by the railroad corporation, rendering it liable to the abutters for the damages occasioned by such taking." And further, (at page 291, 104 N. Y., 10 N. E. Rep. 533:) "An abutting owner necessarily enjoys certain advantages from the existence of an open street adjoining his property, which belong to him by reason of its location, and are not enjoyed by the general public, such as the right of free access to his premises, and the free admission and circulation of light and air to and through his property." This right of light, air, and ventilation is property, and its owner is entitled to its preservation and enjoyment. In Barnett v. Johnson an injunction was issued, restraining the defendant from erecting under license from the canal company, a building over the canal, and adjoining plaintiff's land. And in the Elevated Railroad Cases immense sums of money have been paid to property owners fronting on the streets for obstructions to light and air caused by that structure.

It remains to inquire as to the effect in the case in hand upon these rights of the inclosure of the alley as a part of the play-ground. The complainants' counsel take the ground that the right in this alley was a public right: that it was preserved to the public, and through the public to the complainants, by the application of the maxim that "time does not run against the state." Cross v. Morristown, 18 N. J. Eq. 305; Land Co. v. Hoboken, 36 N. J. Law, 549. I do not think the complainants can avail themselves of that staff. The maxim can be invoked only by the state for the preservation of a public right, and the complainants' rights are, as already shown, strictly private. The complainants must stand upon their private rights alone. It is well settled that mere non-user, for any length of time, no matter how long, will not destroy or extinguish an easement arising, as here, out of express grant, as distinguished from one arising out of long adverse user. In order to destroy the easement by non-user there must, in addition, be some conduct on the part of the owner of the servient tenement adverse to and defiant of the easement, and the non-user must be the result of it. In short, it must amount to an acquiescence of 20 years in acts of the owner of the servient tenement hostile to and intended to prevent it. This was held in substance in Horner v. Stillwell, 35 N. J. Law, 307, at pages 313 and 314; Johnston v. Hyde, 33 N. J. Eq. 632, at page 642; and in Riehle v. Heulings, 38 N. J. Eq. 20, by Chancellor RUNYON, whose decree was affirmed by the court of errors and appeals, for the reasons given by him. At page 23 he says: "A right of way cannot be released, abandoned, or surrendered by a mere parol agreement. The right, in this case, is the privilege of the use of a lane or passage-way of twelve feet wide. It was granted in connection with the conveyance of the lot, (by the same deed,) for use in connection with the lot, and for the convenience of the owners thereof; and the grant was to them, their heirs and assigns forever. If the fact were that the land or passage-way has not been used for the last twenty-seven years except by express permission from the defendant or his father, it would not bar the complainant from a right to relief. The right in question exists by grant, and non-user alone will not forfeit or extinguish it." And see Arnold v. Stevens, 24 Pick. 113, and Owen v. Field, 102 Mass. 112. At page 114 AMES, J., says: "As to the alleged forfeiture of her right to make use of the two springs recently taken into the aqueduct, it is to be remembered that she claims by deed, and for that reason mere non-user would be of no avail to impair or defeat her right. The non-user, to

have that effect, must be in consequence of something which is adverse to the user. Nothing short of adverse use, on the part of the owner of the servient estate, inconsistent with and preventing the use of the easement, can destroy the easement."

Barnes v. Lloyd, 112 Mass. 224. In this case the defendant claimed a right of way from the highway to his land over the intervening land of the plaintiff. The owner of both lots had conveyed defendant's lot to his grantor in 1800, with the express grant of a right of way across the lot retained, and had subsequently conveyed it to the plaintiff's grantor, reserving a right of way in favor of defendant's lot, which reservation had been inserted in all subsequent conveyances of plaintiff's lot down to 1859. Prior to 1870, being a period of 70 years from the creation of the right and 20 years from its last recognition by the owner of the servient tenement, no use whatever of the right of way had been made by the successive owners of the defendant's lot, and plaintiff's lot had always been kept fenced, both on its road side and on the line with defendant's lot, and also across the middle, by fences without any gate-way or bar-way or other opening, and the lot itself had been continuously cultivated. The jury found, nevertheless, that there had not been such adverse use as to extinguish the easement, and the court held that mere non-user, under the circumstances, did not extinguish it. Ward v. Ward, 7 Exch. 838, is to the same effect. And see Jewett v. Jewett, 16 Barb. 150, at page 157; Smyles v. Hastings, 22 N. Y. 217, at page 224; Butz v. Ihrie, 1 Rawle, 218; and Nitzell v. Paschall, 3 Rawle, 76. At page 81 Chief Justice GIBSON says: "Where however, it has been acquired by grant, it will not be lost by non-user in analogy to the statute of limitations, unless there were a denial of the title or other act on the adverse part to quicken the owner in the assertion of his right."

This brings us to consider the character of the adverse user in this case. It consists wholly of the fence along or near to the line of the alley next complainants' lot. The object of the fence was to inclose a play-ground for the children attending the school, and it is quite natural to infer that its object was as much to keep the children within its bounds as to exclude the neighbors from them. The use made of the ground was a *quasi* public use, and was not, as it seems to me, necessarily hostile to access and passage by the adjoining owner. Such must have been the rule acted upon in Barnes v. Lloyd, supra. But I do not deem it necessary to decide in this case whether complainants' right of passage over the *locus in quo* has been lost or not, since, in my judgment, the right to the relief asked for does not depend upon it. The serious question is whether the inclosure in question was adverse to and in defiance of complainants' right of light, air, and ventilation. Defendants contend that the latter right was a mere incident of the right of way, and must stand or fall with it. For the reasons already stated, I cannot adopt that view. The enjoyment of light, air, and prospect over the *locus* could be, and in fact was, enjoyed to its fullest extent without ever placing a foot upon it. They further contend that, according to the authorities, the right of light, air, and ventilation is only appurtenant to a strictly public street. But I have already shown that, as between the parties, this piece of ground must be considered in all respects as if it were in fact a public street; and, moreover, the right in question is one exercisable, and frequently exercised, over lands in which the public has no interest. It was further contended that the inclosure of the *locus* by the school authorities was an act of supreme dominion, and an assertion of defendants' title, exclusive of all rights of every nature in other parties, and was, in effect, notice to the owners of complainants' lot of such assertion. But I cannot so consider it, and do not think the owner of complainants' lot was called upon to so construe it. The inclosure of the *locus* interfered in a very slight degree, if at all, with the exercise of the easement in question, and the familiar rule is (and it is applicable here) that the extent of the right acquired by adverse use is the extent of the actual user. Then it is impossible to eliminate from the problem the object of the inclosure, as well as the location of the first building within it. The school lot as inclosed is, in shape, the south-east half of a square bisected by a line running diagonally across it from north-east to south-west, with a part of the northerly point cut off. Newton avenue ran by the longer side of it, and the school-house faces this avenue, and is about in the middle of the lot. The ground at the sides and rear is used as a play-ground. Now, a considerable space of open ground around a school-house is usual, and, I may add, is almost a necessity; so that one would hardly expect a school-house to be erected without suitable grounds surrounding it. In this instance the space left around the present school-house does not seem too large for that purpose. Looking at a map of these premises as they have existed since 1856, and observing the size of the ground inclosed, I think one would hardly suspect that the school authorities would ever desire to occupy any part of it for any additional building for school purposes. The south-west end of the proposed new building will reach within 10 feet of the old one; its front will be only 8 feet distant from the sidewalk of Newton avenue, and its north-east end will almost touch the line of complainants' lot, leaving an unusually small amount of open ground around it. I do not think that the inclosure of 1856, with the subsequent use of the lot, can be construed as notice to the owners of complainants' lot that at some future day the *locus* in dispute would be used as a site for a school-house. On the contrary, I think it would rather be notice that it would not be so used. I think the owner of complainants' lot may well have thought and said: "I care nothing for the right of passage over this alley, and do not object to its inclosure. Its inclosure and use as a play-ground does not interfere with the light and air from it. So I am content."

Counsel for the defendants invoked the aid of what is called the "balance of con-

venience" rule. They pointed out the great injury which the defendants would suffer from an interruption of the execution of their plans, by which they are bound in contract, and the comparatively slight injury to the complainants. But I do not understand that the rule appealed to applies here. The facts upon which complainants' right rests are clear and undisputed. The rights of the complainants arising out of those facts, I think, are equally clear, and have been recognized by our highest court. The case has reached the stage of final hearing, and the right invaded is a right of property. The building proposed to be erected will occupy the greater part of the alley adjoining complainants' premises, and it was admitted that it would be much higher than the fence, which has stood so many years. But, were the obstruction much less, I do not see how this court could refuse relief on account of the smallness of the injury. To leave the complainants to their remedy at law (supposing that it exists) would be to say to them that they must part with their property for such price as they may realize out of an endless series of actions for damages,—a result entirely contrary to right, justice, and equity. This court has frequently and uniformly exercised its jurisdiction in similar cases, and enjoined the threatened injury. Bechtel v. Carslake, 11 N. J. Eq. 500; Barnett v. Johnson, supra; Riehle v. Heulings, 38 N. J. Eq. 20; and Gawtry v. Leland, 40 N. J. Eq. 323, where the decree of this court was affirmed, on appeal, for the reasons given by the vice-chancellor. In that case there was a mere encroachment upon a private way, not amounting to a complete obstruction, and the vice-chancellor said: "It is not a question of convenience, of how much space is suitable for the complainant, but one of right under the covenant." This last case is the only one of those just cited which was noticed by the court of appeals in Hart v. Leonard, 42 N. J. Eq. 416, 7 Atl. Rep. 865, in the classification there found of the instances in which this court will interfere by injunction on final hearing, and the reference to the cases in which it has so done. But I do not construe the omission of the others as at all discrediting them as authority. In support of their position on this part of the case the defendants' counsel relied upon Zabriskie v. Railroad Co., 13 N. J. Eq. 314; Railroad Co. v. Prudden, 20 N. J. Eq. 541; Higbee v. Railroad, etc., Co., Id. 435; Dodge v. Railroad Co., 43 N. J. Eq. 351, 11 Atl. Rep. 751. I have carefully examined each of them. They are clearly distinguishable from the case in hand. In the first case the complaint was that the horse-railroad track was laid close to the line of the sidewalk, instead of the middle of the street, and its use would prevent access to complainants' abutting land. The injunction was refused on the ground that no improvements were yet made on complainants' lot, and that, until that was done, no injury resulted, and that, in the mean time, it was not worth while to stop the running of the cars. In the Prudden and Higbee Cases the relief was refused on the ground that the complainants had, in each case, acquiesced in the placing of the railroad in the street in front of their several lots, and in the Higbee Case to the placing of the station there also. In the Prudden Case the laying the additional track, the injury threatened, was authorized by the company's charter, and the court held that it must presumably have been contemplated by the complainant in his acquiescence; and in the Higbee Case the addition of a platform to a station was placed in the same category. In both cases the remedy at law was reserved to the complainants, and in the Prudden Case, (page 540,) the resort to this court if the injury proved serious. In Dodge v. Railroad Co. the part of the street about to be obstructed had been vacated by the proper authorities, and complainants, whose land did not abut on the point vacated, fell back on the original dedication by the previous owner of their land. But it turned out that such previous owner had in some way conveyed the part of the street vacated to the railroad company before he conveyed to the complainant, who was held bound by such previous conveyance. Besides, in both the Prudden and the Dodge Cases, there was found the additional question whether, where the private right of the abutting owner upon a dedicated street, which exists prior to its acceptance by the public, has merged, so to speak, upon its acceptance, in the higher public right, such private right revives upon a vacation of a street, which question was an unsettled one in this state. Defendant also called attention to the location of complainants' house, and to the state of the proofs as to its windows, etc. I understood it to be admitted at the hearing that it stood opposite, or nearly so, to the points of nearest approach of the proposed new school-house. But I do not conceive that the present location or condition of complainants' house has the least effect upon their rights. Those rights do not arise from the use of windows in their house of a particular size and location, or, indeed, of any windows, or even a house at all. Those rights would be the same if no house had ever been erected on their lot. Complainants have the right, at their pleasure, to erect a building covering the whole of their lot, and to place in it such openings as they choose on the side next this alley, and to have the benefit of the light, air, and ventilation to be derived from it, and that wholly irrespective of the mode and extent of which they have heretofore enjoyed it.

The conclusion at which I have arrived is contrary to my first impressions, and that circumstance, together with the public character of the interests incidentally involved, have led me into stating my reasons at a perhaps unnecessary length. I think the complainants are entitled to the relief prayed for, and I will advise a decree accordingly.

FALLS MANUF'G CO. v. OCONTO RIVER IMP. CO. et al.

(58 N. W. 257, 87 Wis. 134.)

Supreme Court of Wisconsin. Feb. 23, 1894.

Appeal from circuit court, Oconto county; Samuel D. Hastings, Jr., Judge.

Action by the Falls Manufacturing Company against the Oconto River Improvement Company and others. There was a judgment for defendants, and plaintiff appeals. Affirmed.

The other facts fully appear in the following statement by CASSODAY, J.:

This action was commenced September 28, 1891, to perpetually restrain the defendants from interfering with or interrupting the natural flow of the Oconto river at the plaintiff's pulp mill and milldam, so as to impair the usefulness of its water power, and for $15,000 damages already caused in 1891, prior to the commencement of this action, by the wrongful acts complained of, and such damages as should accrue thereafter during the pendency of this suit, and for costs. The answer consists of admissions, denials, and counter allegations, and justifies under certain acts of the legislature of this state. At the close of the trial the court found, as matters of fact, in effect: That the Oconto river, from its mouth to the junction of its north and south branches, a distance of 50 miles, is a meandered stream of the average width of 100 feet. That its branches were said north and south branches, the Waupee and McCauslin's brook, which flow into the north branch, Peshtigo brook, which flows into the main river just below the junction, and Little river, which flows into the main river below Stiles. That the city of Oconto is situated near the mouth of the main river; that Stiles is 10 miles above the mouth of the river. That Oconto Falls, where the plaintiff's mills and dams are situated, is about 16 miles above said mouth. That Flat Rock dam, owned and operated by the defendants, is about 30 miles above the mouth of the river, and 20 miles below the junction. That the Oconto river and its branches are subject to fluctuations in the height and volume of water. That there is a period of high water or freshet on said stream and its tributaries each spring, lasting, ordinarily, from about the middle of April to about June 1st. That, in addition to such freshets, there is usually a rise of water in June, and occasionally in September, which are much less in extent than the spring freshets, and last only about two weeks. That the average natural flow from the junction of the north and south branches to the mouth of the river, during spring freshets, is from 85,000 to 100,000 cubic feet of water per minute. That an ordinary stage, when there are no freshets, is about 25,000 to 30,000 cubic feet per minute. That during extreme low water, such as occurs once or twice in a lifetime, and did in 1891, it is about from 13,000 to 16,000 cubic feet per minute. That the natural flow fluctuates above and below said quantities, and during November, 1891, it so fluctuated from about 13,000 to 23,000 cubic feet per minute, and the average flow was about 20,000 cubic feet per minute. That in its natural state, without the aid of dams, said river had a capacity to usefully and profitably transport on its waters, from the junction to its mouth, during the spring freshets, about 20,000,000 feet of timber annually. That in said distance there are various rapids and places of shoal water, over which logs will not float without help in the natural state of the river, save during freshets. That there are other places where the smaller logs will float at ordinary or low stages of the water for short distances, but such places are not of sufficient length to make the river practicably navigable for log driving during such stages, without floods. That such June and September freshets are not of sufficient volume or duration, in the natural state of the river, to float logs to any considerable extent, but are sufficient to float them to some extent with the aid of wing dams, horses, and other devices used by log drivers, but are not usually sufficient to render the stream practically navigable for logs during their continuance, without the aid of flooding dams. That by their natural flow only at least 20,000,000 feet of logs, in the aggregate, can be naturally floated down the north and south branches, Waupee, and Peshtigo brook, into said river below the junction, during the spring freshets, but no logs can be thus floated down McCauslin's brook without the use of dams. That logs can thus be floated down the north branch at least 20 or 30 miles, said south branch, 12 or 15 miles, said Waupee, 2 or 3 miles, and said Peshtigo brook, 25 miles. That logs can be floated down said south branch to below the junction, by the natural flow, only, at ordinary stages of water, a distance of about 12 miles, with the aid of wing dams, temporary dams, and assistance from log drivers working on the logs in the stream. That it would be possible at such stages, by such means, to drive some of the smaller logs from the junction to the mouth of the river, but such driving could not be done with any profit to the log owners. That, prior to log driving on the river, there were tributary to it and its branches about 3,000,000,000,000 feet of pine timber, and a large quantity of other floatable timber. That about 2,300,000,000,000 feet of pine were above the plaintiff's mills at Oconto Falls, and about 2,700,000,000,000 feet above the defendant's structures at Flat Rock dam. That in 1851 about 1,000,000 feet of pine logs were driven down the Oconto from above Flat Rock dam, and near the junction, to the city of Oconto, during the spring freshet, without the aid of improvements. That from 1851 the quantity thus driven without such aid between said points increased from year to year to about 25,000,000 feet in 1878 or

1859. That about 1859 private parties began to build flooding dams on said branches above the junction to facilitate the driving of logs down the same, and down the river from the junction, after the spring freshets were over, whereby the natural capacity of the stream and its branches was increased so that by 1866, and thence to 1872, from 60,000,000 to 75,000,000 feet of logs were annually driven down the river from above Flat Rock dam to Stiles and the city of Oconto. That, in the early years of log driving on the river, most of the logs were put in between Oconto Falls, where the plaintiff's mills are situated, and the junction, or within a short distance above the junction, and were largely driven down the river to their destination, near its mouth, on the spring freshets. That, as logging operations extended up said branches, the proportion of logs floated down the river from above the junction increased until now, when most of said logs come from above the junction; and, as such proportion so increased, more and more of said logs came into the main river later in the season, and too late to get the benefit, or full benefit, of the spring freshets, until now, when but a small part, if any, of the logs get below the junction in time for such freshets. That, as the proportion of logs thus coming to the main stream too late for the spring freshets increased, the necessity for increased facilities for floating them down the stream became greater, and for that purpose, from about 1860 until 1872, a flooding dam, known as the "Chute Dam," was built about 25 miles above said junction, on and across said north branch, and was used. That about two-thirds of the water passing at Oconto Falls, where the plaintiff's mills are situated, comes into the river below said Chute dam. That Flat Rock dam was built in 1872, and is a flooding dam, and used by storing the water of the river in its pond, which, when full, holds about 300 acres, and discharging the same in greater quantities than the natural flow, when there are no freshets to aid in driving logs and timber down the stream, and in sorting, handling, and delivering logs below the dam. That such dams are the usual means of driving logs on logging streams of northern Wisconsin. That the Flat Rock dam has been so used each year since 1872, such use beginning after the spring freshets, and continuing, whenever the natural flow was insufficient to drive logs, until the river froze in the fall. That in such use the discharge of stored water is called the "running of heads." That they are ordinarily run daily, but sometimes oftener, and sometimes once in two days, depending upon the adequacy of the natural flow to create sufficient heads for driving. In running heads, the gates of the dams are raised from six to ten hours, and then closed until the next head is run. That heads reach Oconto Falls in about four hours, and increase the natural level of the water there from one to three feet, or, at their highest point, to about the ordinary level of the spring freshet. That the increase at Oconto Falls is wholly within the banks of the river, and continues for about the time the gates at Flat Rock dam are open to run the head. That, while said gates are closed between heads, the flow at Oconto Falls greatly decreases, until it is much less than the natural flow, and during the year 1891 it was at times less than 3,000 cubic feet per minute. That Flat Rock dam was built by the Northwestern Improvement Company, under chapter 363, P. & L. Laws 1869. That said improvement company, about the year 1869, took possession of, and maintained and operated, until the year 1891, the dams and improvements existing on said branches prior to 1869, built other dams besides the Flat Rock dam, and spent large sums of money therein, and in otherwise improving said river and its branches to facilitate the driving of logs therein. That Flat Rock dam was so used, in conjunction with other improvements, from 1872 to 1892, and thereby the natural capacity of said stream was so increased that from 60,000,000 to 75,000,000 feet of logs have been driven down said river and its branches annually since 1872; that there still remain on the river and its branches, above Flat Rock dam, 500,000,000,000 feet of pine and 300,000,000,000 feet of other timber, all tributary to the river and its branches. That flooding dams, used as such Flat Rock dam was and is used, are necessary to make the transportation of logs and timber down said river practicable after the subsidence of the spring freshets. That it is customary to use said Flat Rock dam to repeat the floods created by its heads, from the dams on the tributaries on the Oconto river above Flat Rock dam, in the running of logs from said Flat Rock dam past the plaintiff's mills, and to the mill slides of the several sawmills at the city of Oconto, and it was so used in 1891 and 1892. That while Volk was running said mill, prior to 1885, the defendant the Northwestern Improvement Company did a large amount of blasting in the falls at Oconto Falls, constituting, in part, said water power, to facilitate the passage of logs over said falls. That said Volk made no objection to said blasting and improvement. That April, 1884, the plaintiff became the owner of a one-half interest in the Volk dam. That in 1888 the plaintiff acquired the whole interest in that dam and water power, and owns numerous mills constructed thereon before the commencement of this action. That before the plaintiff purchased any interest in the water power it knew that the river was a log-driving stream, and before it built its first mill it knew that, in driving, its natural flow at Oconto Falls was interfered with by flooding dams, substantially as it had been since 1872 and was in 1891 and 1892, and it built each of said mills with such knowledge. That from 1885 to 1891 the plaintiff complained, from time to time, to individual directors of

the defendant Northwestern Improvement Company, that the use of the Flat Rock dam interfered with the use of its water power, and in 1891 made similar complaint to the Oconto River Improvement Company. That the value of the plaintiff's water power plant is about $200,000. That the interruption of the plaintiff's business, caused by the running of said heads, was a damage of $2,500 in 1891, and $500 in 1892. As conclusions of law the court found, in effect, that the Oconto river is a navigable stream and a public highway for the transportation of logs and timber from above Flat Rock dam to its mouth; that Flat Rock dam is an authorized means for the improvement of said navigation, and the Oconto River Improvement Company had the right to use it as it did in 1891 and 1892, paramount to the plaintiff's right to hydraulic power; that the defendants are entitled to judgment dismissing the plaintiff's complaint, with costs. From the judgment entered thereon, accordingly, August 29, 1893, dismissing the plaintiff's complaint, with costs, the plaintiff brings this appeal.

H. O. Fairchild and Hooper & Hooper, for appellant. Greene & Vroman, for respondents.

CASSODAY, J., (after stating the facts.) This case comes before us upon the findings of the court, and so there is no dispute about the facts. The plaintiff's milldam and manufacturing plant were constructed under legislative authority, and are of great value. They are situated 16 miles above the mouth of the river, and have always been used exclusively for manufacturing purposes. The statutes authorizing the same have at all times required the proprietor to maintain in the dam a chute or slide sufficiently deep and wide to allow the passage of logs coming down the river. The same is true of other dams above and below the plaintiff's dam, owned by those not parties to this action. One of such dams is situated six miles below the plaintiff's, and has been used, in part, for flooding purposes to aid in driving logs on the river. In 1867 the legislature made it a criminal offense for any person, at any time or in any manner, negligently or with design, to put, or cause to be put, into the Oconto river, in Oconto county, any refuse lumber, slabs, sawdust, or other waste materials to an extent that should materially hinder or obstruct navigation. Chapter 506, P. & L. Laws 1867. Flat Rock dam is the principal structure of the defendants, and is situated 14 miles above the plaintiff's dam. It was first constructed under chapter 363, P. &. L. Laws 1869, which authorized the defendant the Northwestern Improvement Company and its successors to improve the portions of the Oconto river and its branches and tributaries described, by blasting rocks, dredging, and ditching in the several channels within such limits, and by constructing dams, wing dams, booms, side booms, chutes, or slides, and by all other proper means for making the same navigable for the driving of sawlogs; and for that purpose the company was thereby expressly authorized to entirely close any slough, bayou, or channel so as to prevent the diversion of water from the channel so improved, and to charge and collect tolls for all logs or timber run through such improvements, at the rates therein specified. By the act of congress of July 12, 1876, consent was expressly given to the defendant the Northwestern Improvement Company "to improve the Oconto river and its branches and tributaries, so as to run logs down said river and its branches and tributaries, across the Menomonee Indian reservation, in accordance with the laws of" Wisconsin, subject to the conditions therein named. 19 Stat. 89. December 31, 1890, the defendant the Oconto River Improvement Company was incorporated under chapter 86, Rev. St., and the amendments thereto, for the purpose, as expressed in its articles of incorporation and charter, of improving the Oconto river and its branches, and driving, sorting, and delivering logs and timber therein, as provided in said chapter. The formation of such corporations is therein expressly authorized for the purpose of the "improvement of rivers and streams, and for driving, sorting and delivering logs or timber." Sanb. & B. Ann. St. § 1771. It is further expressly provided in that chapter that any corporation formed thereunder "in whole or in part for the improvement of any stream and driving logs therein and for holding or handling logs therein, which shall have taken prior possession of such stream for that purpose, shall have power to improve such stream and its tributaries, by cleaning and straightening the channels thereof, closing sloughs, erecting sluice-ways, booms of all kinds, side rolling and flooding dams or otherwise, if necessary; but shall in no case, in any manner, materially obstruct or impede navigation upon such streams, or erect any dam or other obstruction below the head of steamboat navigation, or obstruct any navigable slough, except with the written consent of the owners of the entire shores on both sides thereof." Sanb. & B. Ann. St. § 1777. The same section not only authorizes such corporation to take charge of logs at the request of the owner, but, under certain conditions mentioned, to take possession of any and all logs put into such stream, and to drive the same to their respective destinations; and also expressly provides that "no injunctional order shall be granted to prevent the use or enjoyment of any such improvement, or abate any such dam necessary thereto, unless such corporation shall fail for sixty days after judgment to pay any damages recovered for any injury done by or in consequence of its works." Id. January 27, 1891, the defendant Northwestern Improvement Company conveyed to the defendant Oconto River Im-

provement Company the Flat Rock dam and all its improvements on the river and its branches; and that company has since operated the same substantially as before, to drive annually substantially the same quantity of logs. There is no claim that the defendants have at any time improperly operated their flooding dam, nor that they have exceeded the powers thus given to them by the several statutes mentioned. The contention is that the plaintiff is also acting under statutory authority, prior in time, and that the rights of the respective parties are correlative; in other words, the contention is that the defendants cannot so operate their flooding dam as to impair the efficiency of the plaintiff's water power. As indicated in the foregoing statement, the flooding dam is 14 miles above the plaintiff's water power. Of course, the plaintiff has no title or ownership to any of the particles of water at the flooding dam, nor anywhere in the river. Lawson v. Mowry, 52 Wis. 234, 9 N. W. 280. It is the use of water while passing that gives it value. Id. It is only the interference with such use by the plaintiff that is here complained of. One of the purposes of the flooding dam is to detain the water, from time to time, when the stream is low, until a sufficient quantity has accumulated to successfully float the logs to their destination, and then to let off the same in larger volume. When so detained, it frequently diminishes the water power at the plaintiff's mills so as to prevent some of them from running at all, or at their full capacity. It is the injury resulting from such detention of water that is here made the principal ground of complaint. Counsel for the plaintiff here invoke the equitable powers of the court to prevent such intermittent increase and decrease in the flow of the water at its mill, and to regulate the rights of the respective parties in regard to such flow. Undoubtedly, in a proper case, equity will interpose to regulate the common use of water, to determine the extent of conflicting claims thereto and the proper mode of exercising and enjoying such rights, as tending to prevent litigation, and affording a more complete and perfect remedy than could be obtained at law. Lawson v. Woodenware Co., 59 Wis. 398, 18 N. W. 440. In support of such contentions, counsel cite numerous adjudications from other states, and also seem to rely upon two cases decided by this court. Miller v. Sherry, 65 Wis. 129, 26 N. W. 612; A. C. Conn Co. v. Little Suamico Lumber Manuf'g Co., 74 Wis. 652, 43 N. W. 660. In neither of these cases was the question of statutory authority involved. The controlling fact here present is that the flooding dam and other improvements of the defendants were constructed under statutory authority, at great expense, for the express purpose of aiding in the transportation of sawlogs and timber on the Oconto and its several branches and their tributaries. If such statutes are valid, and the defendants do not transcend the authority thereby given, and the stream is confined within its banks, then it would seem the defendants are at liberty to operate the flooding dam for the purposes mentioned, regardless of whether it increases or diminishes the volume of the stream at the plaintiff's mills 14 miles below.

The law, as settled by a long line of decisions in this state, is that streams of sufficient capacity to float logs to market are navigable. Weatherby v. Meiklejohn, 56 Wis. 76, 13 N. W. 697, and cases there cited; A. C. Conn Co. v. Little Suamico Lumber Manuf'g Co., 74 Wis. 655, 43 N. W. 660. These cases treat such streams as public highways or waterways. In the case last cited, Cole, C. J., said: "The real test to determine whether the stream is a public highway is not the fact that it has been meandered and returned as navigable, but whether it is navigable in fact,—capable of being used, and actually used, for floating lumber and logs and other products of the country to mill and market. If it is, it is then a public highway. So that, where a stream is in fact usefully navigable in this manner, all the rights of the public attach, and no obstruction can be placed therein without legislative permission." We are told by counsel that it is an unfortunate misnomer to call such streams navigable, because they do not bear ships upon their bosoms. Of course, they are not navigable to the extent, nor in the sense, that Lake Michigan or Green Bay or the Mississippi river are navigable, but that does not prevent their being navigable. "In the United States, the legal meaning of 'navigable' has been much extended, and it includes, generally, all waters practically available for floating commerce by any method, as by rafts or boats." Cent. Dict. Thus, in The Montello, 20 Wall. 430, it was held that the navigability of a stream does not depend upon the mode by which commerce is conducted upon it, nor upon the difficulties attending the navigation, but upon the fact whether the stream, in its natural state, is such as to afford a channel for useful commerce. That doctrine was in that case applied to the Fox river, which originally was not fitted for useful commerce, but was only navigated by Durham boats. The act of congress mentioned, provided that the Menomonee "Indians and all other persons shall be permitted to use said river for the purpose of running logs, as contemplated in this act, and the charges for said privileges shall be regulated by the legislature of the state of Wisconsin." The acts of the legislature referred to treat the Oconto as a navigable river. The findings of the trial court conclusively determine, so far as this case is concerned, that the river and its branches are, as a matter of fact, public navigable water ways for the transportation of logs and timber, as indicated. Being such public navigable water ways, the legislature must, under numerous adjudications of this court, be regarded as having, in aid of such navigation, plenary

power to authorize such flooding dams and other structures. Improvement Co. v. Manson, 43 Wis. 255; Boom Co. v. Reilly, 44 Wis. 295; Id., 46 Wis. 237, 49 N. W. 978; Cohn v. Boom Co., 47 Wis. 314, 2 N. W. 546; Borchardt v. Boom Co., 54 Wis. 107, 11 N. W. 440; Association v. Ketchum, 54 Wis. 313, 11 N. W. 551; Edwards v. Boom Co., 67 Wis. 463, 30 N. W. 716. In Black River Imp. Co. v. La Crosse B. & Transp. Co., 54 Wis. 659, 11 N. W. 443, it was, in effect, held that in aid of such navigation the legislature had legally authorized the closing up of Black Snake river, a branch of the Black river, even though it incidentally injured private persons. To the same effect, South Carolina v. Georgia, 93 U. S. 4. In Rundle v. Canal Co., 14 How. 80, the efficiency of the water power was very much impaired, if not destroyed, by the canal which, under statutory authority, tapped the river above the dam, but it was held that the owner of the dam was without remedy. Thus, in Improvement Co. v. Manson, 43 Wis. 265, it is said: "The legislature is, primarily at least, the judge of the necessity of the improvement; and when it delegates the power to a corporation, and the state does not question that the improvement made by the corporation is in conformity with the delegated power, it seems to us that neither the necessity nor usefulness of the improvement, nor the manner in which it is made, can be called in question by private parties." To the same effect, J. S. Keator Lumber Co. v. St. Croix Boom Corp., 72 Wis. 80–87, 38 N. W. 529; Underwood Lumber Co. v. Pelican Boom Co., 76 Wis. 85, 45 N. W. 18. The same doctrine has been repeatedly sanctioned by the supreme court of the United States. Thus, in Huse v. Glover, 119 U. S. 543, 7 Sup. Ct. 313, it was held: "If, in the opinion of a state, its commerce will be more benefited by improving a navigable stream within its borders than by leaving the same in its natural state, it may authorize the improvements, although increased inconvenience and expense may thereby attend the business of individuals." So, in Sands v. Improvement Co., 123 U. S. 288, 8 Sup. Ct. 113, it was held, in effect, that the commerce which is confined wholly within the limits of a particular state is subject to the absolute control of such state, and that, to encourage the growth of such commerce and render it safe, such state may provide for the removal of obstructions from its rivers and harbors, and deepen their channels and improve them in other ways, and exact a reasonable toll from those who use the same, as compensation therefor; and that such exaction does not deprive the person paying the same of his property without due process. In Bridge Co. v. Hatch, 125 U. S. 1, 8 Sup. Ct. 811, it was held that, until congress acts respecting navigable streams entirely within a particular state, such state has plenary power over the same. That such is the law is regarded as no longer an open question in the late case of Monongahela Nav. Co. v. U. S., 148 U. S. 329, 330, 13 Sup. Ct. 622. The more serious question has at times been raised as to whether the legislature had power to authorize obstruction to such navigation in such streams, in view of the provisions of our state constitution, which declares, in effect, that "the navigable waters leading into the Mississippi and St. Lawrence and the carrying places between the same shall be common highways and forever free, as well to the inhabitants of the state, as to the citizens of the United States, without any tax, impost or duty therefor." Section 1, art. 9. In construing similar clauses in the enabling acts of several of the states, the supreme court of the United States, in some of the cases cited and others, have uniformly held that it does not refer to physical obstructions, but merely to political regulations which would hamper the freedom of commerce. Bridge Co. v. Hatch, 125 U. S. 1, 8 Sup. Ct. 811, and cases there cited; J. S. Keator Lumber Co. v. St. Croix Boom Corp., 72 Wis. 62, 38 N. W. 529, and cases there cited. It is, however, unnecessary to determine that question here. The judgment of the circuit court is affirmed.

PAGE et al. v. MILLE LACS LUMBER CO.

(55 N. W. 608, 53 Minn. 492.)

(Supreme Court of Minnesota. June 12, 1893.

Appeal from district court, Mille Lacs county; Searle, Judge.

Action by E. T. Page and others, as Page Bros., against the Mille Lacs Lumber Company. Defendant had judgment, and, from an order denying a new trial, plaintiffs appeal. Reversed.

W. Hammons, for appellants. Eller & How, for respondent.

COLLINS, J. When plaintiffs rested their case upon the trial the court dismissed the same on the ground that the testimony introduced was insufficient to sustain the action. A motion for a new trial was afterwards denied, and the questions involved are before us on a bill of exceptions. From this bill it appears that both parties have been engaged in lumbering for several years upon Rum river, a stream navigable for logs and timber. Both parties cut their logs on the upper waters, and drive them to their respective mills, there to be manufactured into lumber. The plaintiffs' mill is at Anoka, the defendant's about 75 miles above it, at Milaca; and it follows that plaintiffs' logs must be driven past the point at which defendant's are taken from the stream and manufactured. The only practicable way in which either of these mills could be supplied with logs was by driving them down the said river. Just above its mill the defendant company constructed two dams across the river, about a half mile apart, the natural result being to create a pond and slack water above each, the slack water in the upper pond extending about 3,000 feet above the upper dam. In this pond the defendant placed piers, piling, and boom sticks, so that a path or way was made from 40 to 70 feet wide, leading from about where the slack water began directly to the dam, and crossing the original channel of the stream twice. Side booms were put in by defendant on either side of the way, and at a convenient place a sorting gap, and all logs coming down the river had to pass men in defendant's employ, stationed at the gap, whose business it was to guide logs bearing defendant's marks into these side booms for storage, and to allow all other logs to pass on. Between the dams there was piling and booms. The inevitable result was to delay and detain plaintiffs' and all other logs destined for points below defendant's mill. In the years 1890 and 1891 these plaintiffs were engaged for themselves, and, under contract, for other persons, in making what is called a "clean drive" of the river. It is unnecessary to go into the details as to the exact manner in which it was done, but the testimony produced by plaintiffs on the trial tended to show that by reason of the piers, piling, booms, boom sticks, and dams before mentioned, and the way in which defendant's employes performed their work above and at the sorting gap, and appropriated the river for the storage of defendant's logs, the passage of the logs which plaintiffs were driving was unnecessarily impeded and obstructed, and that plaintiffs were unreasonably and oppressively hindered and delayed in their driving operations, to their great damage; the object of this action being to recover the amount of such damages.

It is apparent that the learned trial judge, although convinced that by reason of the maintenance of a public nuisance in the river a wrong had been committed for which plaintiffs should have redress, felt constrained to dismiss the action on the authority of two recent cases (Swanson v. Boom Co., 42 Minn. 532, 44 N. W. Rep. 986, and Lammers v. Brennan, 46 Minn. 209, 48 N. W. Rep. 766,) and we are obliged to admit that, if reliance could be placed on our views as to the proper application of a well-settled rule of law to a given state of facts as expressed in Swanson v. Boom Co., he was fully justified in his ruling. While differing somewhat on the facts, the present case cannot be distinguished from that, and the rule there announced as applicable and controlling, preventing a recovery by the plaintiff, if rightly applied on that occasion, would be equally as pertinent and equally as determinative on this. But we are now convinced that an error was committed in the application to the facts in the Swanson Case of the salutary and well-established rule that an individual can not maintain a private action for a public nuisance by reason of any injury which he suffers in common with the public, and that it is only when he sustains special injury differing in kind, not merely in degree or extent, from that sustained by the general public, that he may recover damages in a private action; and an examination of the opinion recently filed in Aldrich v. City of Minneapolis, 53 N. W. Rep. 1072, will indicate that we then had doubts of the correctness of the decision in Swanson v. Boom Co. In the opinion in Aldrich v. City of Minneapolis most of the cases in this court bearing on the subject, and many others, were referred to and discussed, and we are not inclined to again go over the ground. It is obvious that there has been a very marked conflict of opinion in the application of the rules pertaining to the rights of private parties to have redress in private actions when injuries have grown out of public nuisances, and as to where, on the facts, the line should be drawn. This conflict, and that the adjudicated cases are irreconcilable, is well shown in Stetson v. Faxon, 19 Pick. 147; Farrelly v. City of Cincinnati, 2 Disn. 516; and in Wood, Nuis. c. 19. That a nuisance, such as an unreasonable or wanton obstruction of a navigable stream, a public highway, may be public in its general effect

upon the public, and at the same time private as to those individuals who suffer a special and particular damage therefrom, distinct and apart from the common injury, need not be demonstrated by illustration. The public wrong inflicted upon all persons must be redressed by a public prosecution, and the private injury by an appropriate private action. An obstruction to a highway, although it be an infringement upon the rights of the general public, in the nature of a public nuisance, may be, and frequently is, productive of special and particular damage to a private individual; and it would be highly unjust and inequitable to say that he has no right of redress in a private action, on the ground, merely, that the injury had resulted from an act which is a public offense in itself, and because other persons might have been injured and damaged in the same manner and to the same extent, had they met the obstruction under like circumstances. Such is not the law. The general doctrine in reference to the use of navigable streams as public highways is that each person has an equal right to their reasonable use. What constitutes a reasonable use depends upon the circumstances of each particular case, and no positive rule can be laid down to define and regulate such use with precision, so various are the subjects and occasions for it, and so diversified the relations of the parties therein interested. The defendant had the right, as had the plaintiffs, to use the river as a highway for the purposes of navigation, and, as an incident to this, the right to secure its logs in side booms, although the inevitable result would be to temporarily obstruct the logs of other persons destined for a mill or market further down the stream. And we have no doubt of its right, in a reasonable manner, to erect piers and dams, and to put in piling, and attach boom sticks, and also to maintain side booms for the storage of logs; but it was not authorized by the construction of piers, dams, booms, or boom sticks, or by the management of either, or of a sorting gap, to unreasonably or oppressively obstruct or blockade the way. It must use the stream with due deference to the rights of others, and in most respects streams used for highway purposes are governed by the same general rules of law as are highways upon land. No general rule can be laid down for determining whether a pleading shows, or whether the evidence produced upon a trial tends to establish, a case under the principle or rule that, to maintain an action for a wrong or injury arising out of the maintenance of a public nuisance, an individual must have sustained special injury differing in kind, not merely in degree or extent, from that sustained by the general public; and we shall not attempt it. It is well discussed in Aldrich v. City of Minneapolis, supra. We are of the opinion that the case now under consideration was brought within the rule, and that the evidence tended to show that plaintiffs had suffered a special and particular injury. This injury, the direct result of an unreasonable detention of their logs by means and methods for which defendant company is responsible, was wholly distinct and different in kind, not merely in degree and extent, from that sustained by the general public. A private action can be maintained to redress this injury, notwithstanding there is also a remedy afforded the public. In principle the plaintiffs' rights cannot be distinguished from the individual rights considered in Brakken v. Railway Co., 29 Minn. 41, 11 N. W. Rep. 124, and in numerous other cases in this court, where an action to redress a private wrong, growing out of a public nuisance, has been declared the proper remedy. Attention is called to Brown v. Watson, 47 Me. 161, and Enos v. Hamilton, 27 Wis. 256, in which the exact question now before us has been discussed briefly, and passed upon. Both cases support the conclusion herein reached, and the one last cited has been approved in at least three later cases in the same court. That it has been the common practice to bring actions at law not distinguishable from that at bar, and also in equity, and to prosecute them to a successful termination, will be seen from an examination of the following: Powers v. Irish, 23 Mich. 429; Watts v. Boom Co., 52 Mich. 203, 17 N. W. Rep. 809; Gifford v. McArthur, 55 Mich. 535, 22 N. W. Rep. 28; Enos v. Hamilton, 24 Wis. 658; Clark v. Peckham, 10 R. I. 36; Blanchard v. Telegraph Co., 60 N. Y. 510; Hughes v. Heiser, 1 Bin. 463; Weise v. Smith, 3 Or. 445; Lancey v. Clifford, 54 Me. 487; Dudley v. Kennedy, 63 Me. 465; McPheters v. Boom Co., 78 Me. 329, 5 Atl. Rep. 270; Frink v. Lawrence, 20 Conn. 117. Order reversed.

VANDERBURGH, J., absent, took no part herein.

MITCHELL, J. I concur in the result, and do so more especially on the ground that, for the purposes for which plaintiffs were using the river, (driving logs,) it was their only highway for getting their timber to their mill.

See Butterfield v. Gilchrist, 53 Mich. 22, 18 N. W. 542.

MINNEAPOLIS MILL CO. v. BOARD OF WATER COM'RS OF CITY OF ST. PAUL.

ST. ANTHONY FALLS WATER-POWER CO. v. SAME.

(58 N. W. 33.)

Supreme Court of Minnesota. Feb. 9, 1894.

Appeals from district court, Hennepin county; Thomas Canty, Judge.

Action by the Minneapolis Mill Company against the board of water commissioners of the city of St. Paul for an injunction, and an action by the St. Anthony Falls Water-Power Company against the same defendant for the same relief. The two actions were tried together, and both dismissed. From orders denying a new trial, plaintiffs appeal. Affirmed.

Benton, Roberts & Brown, for appellants. Leon T. Chamberlain and Walter L. Chapin, for respondent.

COLLINS, J. These cases were tried together in the court below, and, when plaintiffs (appellants here) rested, both actions were dismissed, upon defendant's motion. From orders refusing new trial, appeals were taken. Appellants are corporations created in 1856 by acts of the territorial legislature, and authorized to build and maintain dams in the Mississippi river at the falls of St. Anthony, about 10 miles above St. Paul, for the development of a water power, and for the use and sale of such power. One of these corporations, owning the shore on the east side of the river, erected a dam to the proper point in the river channel, and the other, owning the east shore, built its dam so as to connect the two, thus forming a power which has ever since been maintained and used. In 1883 the legislature authorized the city of St. Paul to purchase, and there was purchased, the property and franchises of a private corporation theretofore engaged in supplying said city with water. A board of water commissioners was created by the same act, and that board, a branch of the city government, is the present respondent. By the provisions of an amendatory act (Sp. Laws 1885, c. 110, § 5 et seq.) the board was authorized and empowered to add to its sources of supply, and to draw water from any lake or creek, and, in general, to do any act necessary in order to furnish an adequate supply of water for the use of the city. The manner in which it should acquire the right to extend its works so as to connect with any body of water deemed necessary for an increased supply, was specified, and in section 7 it was provided that "after making compensation as hereinafter provided to the owners of or the persons interested in the lands so to be taken and for damages by reason of diverting the water of any stream, creek, or body of water, said city shall have an easement therein." In section 8, provision was made for the appointment of commissioners to assess the damages sustained by the owners of lands to be taken, or by other persons, by reason of such taking, or arising by the construction, use, and operation of the works. Under this act the respondent duly established a pumping station at Lake Baldwin, a body of water with an area less than a mile square, and by means of its pumps forced water through conduits to the city for public use. The outlet of this lake is Rice creek, and this creek empties into the Mississippi river a few miles above the dams built and maintained by appellants. Claiming that the result of this diversion of water was to greatly diminish the volume which came to the dam, and to materially affect and reduce the water power, appellants brought these actions to restrain and enjoin perpetually the operation of respondent's works at the lake, and the diversion of water therefrom.

Counsel for both parties made lengthy oral arguments, and have filed very full briefs. Many questions have been discussed which we do not regard as connected with the case, and hence we need not refer to them. There are a few well-settled principles which we regard as covering and controlling the facts before us, and a statement of these, with a construction of certain parts of the act under which respondent's board was authorized to obtain further and other sources of water supply, will dispose of these appeals.

1. The appellants are riparian owners on a navigable or public stream, and their rights as such owners are subordinate to public uses of the water in the stream. And their rights under their charters are, equally with their rights as riparian owners, subordinate to these public uses.

2. There can be no doubt but that the public, through their representatives, have the right to apply these waters to such public uses without providing for or making compensation to riparian owners.

3. The navigation of the stream is not the only public use to which these public waters may be thus applied. The right to draw from them a supply of water for the ordinary use of cities in their vicinity is such a public use, and has always been so recognized. At the present time it is one of the most important public rights, and is daily growing in importance as population increases. The fact that the cities, through boards of commissioners or officers whose functions are to manage this branch of the municipal government, charge consumers for water used by them, as a means for paying the cost and expenses of maintaining and operating the plant, or that such consumers use the water for their domestic and such other purposes as water is ordinarily furnished by city waterworks, does not affect the real character of the use, or deprive it of its public nature.

4. In thus taking water from navigable streams or lakes for such ordinary public

uses, the power of the state is not limited or controlled by the rules which obtain between riparian owners as to the diversion from, and its return to, its natural channels. Once conceding that the taking is for a public use, and the above proposition naturally follows.

5. Turning now to the provisions of respondent's charter, (chapter 110, supra,) it will be seen that the board was not limited to public waters as the sources of its contemplated additional supplies. It was authorized to appropriate private waters for the purpose, and hence the provisions of the act which provided for the ascertaining of, and making compensation for, damages caused by a diversion of water, must be construed as applying solely to cases where the board took private property by using or diverting merely private waters. Inasmuch as the state itself could use the waters in question, as against the appellants, without compensation, it would require very clear language to that effect to justify the conclusion that the legislature intended to impose on respondent board the burden of paying appellants for what, as against the public, they did not own. If the right granted by the legislature had been exclusively to divert waters from a certain specified body of public water, such as one by the "great" ponds of Massachusetts, referred to in the cases cited from the Reports of that state, so that the provisions in chapter 110 relating to compensation could not apply to anything else,—to the owners of private waters, for instance,—the construction contended for by appellants, that it was intended they should be compensated in case damages resulted, might arise by implication. Orders affirmed.

The CHIEF JUSTICE did not sit. VANDERBURGH, J., took no part in the decision.

GILLIS v. CHASE et al.

(31 Atl 18.)

Supreme Court of New Hampshire. Hillsborough. March 11, 1892.

Case reserved from Hillsborough county.

Five actions by John F. Gillis, administrator of John Gillis, against William F. Chase and others, for diverting water, and diminishing the flow on plaintiff's land.

Facts found by the court: The plaintiff and one J. S. Winn are riparian owners. Winn's land is above the plaintiff's upon the stream. About 15 years ago Winn built a dam to hold back the water, and formed a reservoir, from which, by an aqueduct, he supplied water to his farm buildings. He also permitted the defendants, who are not riparian owners, to connect aqueducts with the reservoir, and thereby supply their buildings with water, conveying to same by deed a right to such use. The defendants all claim the right to take the water from the reservoir under J. S. Winn, the owner of the land where the reservoir is located, and the owner of a part of the meadow from which the water is collected. The use of the water made by the several defendants is reasonable as to the quantity used. Should all the defendants cease using the water, the amount flowing by the plaintiff's land would not be perceptibly increased. Judgment for defendants.

Henry B. Atherton, for plaintiff. Chas. H. Burns, for defendants.

BLODGETT, J. The case finds that "the defendants all claim the right to take the water from the reservoir under J. S. Winn, the owner of the land where the reservoir is located, and the owner of a part of the meadow from which the water is collected." In virtue of the ownership, Winn's right to divert the water for use to a reasonable extent was incident to the land, and, as the plaintiff has failed to show any actual damage, it is only for an unreasonable and unauthorized diversion that the law will imply damage to him, because, each riparian proprietor having the right to a just and reasonable use of the water as it passes through and along his land, it is only when he transcends his right by an unreasonable and unauthorized use of it that an action will lie against him by another proprietor, whose common and equal right to the flow and enjoyment of the water is thereby injuriously affected. And as the reasonableness of the use is, to a considerable extent, a question of degree, and largely dependent on the circumstances of each case, it is to be judged of by the jury, and must be determined at the trial term as a mixed question of law and fact. Jones v. Aqueduct Co., 62 N. H. 488, 490; Rindge v. Sargent, 64 N. H. 294, 295, 9 Atl. 723. This question having been found adversely to the plaintiff by the trial court, the finding is conclusive against him (Jones v. Aqueduct Co., supra), and consequently the only question now open to him is as to the right of Winn, in his character as a riparian proprietor, to sell the nonriparian defendants any of the water belonging to him as incident to his land. The English rule is understood to be that "a riparian owner cannot, except as against himself, confer on one who is not a riparian owner any right to use the water of the stream; and any used by a nonriparian proprietor, even under a grant from a riparian owner, is unlawful." Ormerod v. Mill Co., 11 Q. B. Div. 155; Swindon Waterworks Co. v. Wilts & Berks Canal Nav. Co., L. R. 7 H. L. 697; Nuttall v. Bracewell, L. R. 2 Exch. 1. But this rule is otherwise in this jurisdiction, for it is held here to be a question of fact whether the use of the water made by a riparian owner for his own purposes or for sale to others, is, under all the circumstances, a reasonable use. Jones v. Aqueduct and Rindge v. Sargent, supra. And in view of the finding that the sale of the water to the defendants by Winn is a reasonable use of his right as a riparian owner, the plaintiff has no standing on this branch of the case. Judgment for the defendants.

CLARK, J., did not sit. The others concurred.

DUMONT v. KELLOGG.

(29 Mich. 420.)

Supreme Court of Michigan. July Term, 1874.

Error to circuit court, Allegan county.

Norris, Blair & Kingsley, for plaintiff in error. Williams & Humphrey and Hughes, O'Brien & Smiley, for defendant in error.

COOLEY, J. The grievance complained of by Kellogg in the court below was that Dumont had constructed a dam across a natural water course, and by means thereof wrongfully detained the water in the stream to the prejudice and injury of the plaintiff, who was proprietor of a mill previously erected on the stream below. The reservoir created by defendant's dam was quite a large one, and plaintiff gave evidence that the flow of water in the stream below was considerably diminished by the increased evaporation and percolation resulting from the construction of this dam. The plaintiff had judgment in the court below, and the case comes here upon exceptions, the errors principally relied upon being assigned upon the instructions to the jury, and involving the relative rights of riparian proprietors to make use of the waters of a running stream which is common to both, and to delay its flow for that purpose.

The instructions given were numerous, and the most of them were unexceptionable. Others appear to be based upon a view of the law which is not to be reconciled with the authorities. Of these are the following:

"Every proprietor of lands on the banks of a stream, and every mill owner, has an equal right to the flow of the water in the stream as it was wont to run, without diminution or alteration; no proprietor has the right to use the water to the prejudice of the proprietors below him, without the consent of the proprietors below; he cannot divert or diminish the quantity which would otherwise descend to the proprietors below.

"He must so use the water as not materially to affect the application of the water below or materially diminish its quantity.

"If the jury find, from the evidence, that Dumont's dam and pond have diminished, by the increased evaporation and soakage occasioned by it, the flow of the water in the Dumont creek one-third, or any other material amount, and that the plaintiff has sustained damages thereby, then the plaintiff is entitled to recover in this action.

"The rights of a riparian proprietor are not to be measured by the reasonable demands of his business. His right extends to the use of only so much of the stream as will not materially diminish its quantity, so that in this case the question whether defendant needs the water as he uses it in his business is entirely immaterial.

"The defendant had the right to build a dam upon his land, but he must so construct the dam and so use the water as not to injure the plaintiff below in the enjoyment of the same water, according to its natural course."

In endeavoring to determine the soundness of these instructions, we may dismiss from the mind the fact that the plaintiff had first put the waters of the stream to practical use, since that fact gave him no superiority in right over the defendant. The settled doctrine now is that priority of appropriation gives to one proprietor no superior right to that of the others, unless it has been continued for a period of time, and under such circumstances, as would be requisite to establish rights by prescription. Platt v. Johnson, 15 Johns. 213; Tyler v. Wilkinson, 4 Mason, 397, Fed. Cas. No. 14,312; Gilman v. Tilton, 5 N. H. 231; Pugh v. Wheeler, 2 Dev. & B. 50; Hartzall v. Sill, 12 Pa. St. 248; Gould v. Duck Co., 13 Gray, 442; Wood v. Edes, 2 Allen, 578; Parker v. Hotchkiss, 25 Conn. 321; Heath v. Williams, 25 Me. 209; Snow v. Parsons, 28 Vt. 463; Bliss v. Kennedy, 43 Ill. 67; Cowles v. Kidder, 24 N. H. 378. It is not claimed that any question of prescription is involved, and the case is consequently to be regarded as only presenting for adjudication the relative rights of the parties at the common law to make use of the flowing waters of the stream, unaffected by any exceptional circumstances.

And in considering the case it may be remarked at the outset that it differs essentially from a case in which a stream has been diverted from its natural course and turned away from a proprietor below. No person has a right to cause such a diversion, and it is wholly a wrongful act, for which an action will lie without proof of special damage. It differs, also, from the case of an interference by a stranger, who, by any means, or for any cause, diminishes the flow of the waters; for this also is wholly wrongful, and no question of the reasonableness of his action in causing the diminution can possibly arise. And had the instructions which are excepted to been given with reference to a case of diversion, or of obstruction by a stranger, the broad terms in which the responsibility of the defendant was laid down to the jury might have found abundant justification in the authorities.

But as between two proprietors, neither of whom has acquired superior rights to the other, it cannot be said that one "has no right to use the water to the prejudice of the proprietor below him," or that he cannot lawfully "diminish the quantity which would descend to the proprietor below," or that "he must so use the water as not materially to affect the application of the water below, or materially to diminish its quantity." Such a rule would be in effect this:

That the lower proprietor must be allowed the enjoyment of his full common-law rights as such, not diminished, restrained, or in any manner limited or qualified by the rights of the upper proprietor, and must receive the water in its natural state as if no proprietorship above him existed. Such a rule could not be the law so long as equality of right between the several proprietors was recognized, for it is manifest it would give to the lower proprietor superior advantages over the upper, and in many cases give him in effect a monopoly of the stream.

Cases may unquestionably be found in which the rule of law is laid down as broadly as it was given by the circuit judge in this case, but an examination of them will show either that the facts were essentially different, or that the general language was qualified by the context. Thus the language employed in the first instruction as above given seems to have been quoted from Lord Tenterden, in Mason v. Hill, 3 Barn. & Adol. 312. But there it had reference to a case of diversion of water, and was strictly accurate and appropriate. The same language substantially is made use of in Twiss v. Baldwin, 9 Conn. 291; Wadsworth v. Tillotson, 15 Conn. 373; Arnold v. Foot, 12 Wend. 331,—and probably in many other cases, and is adopted by Chancellor Kent in his Commentaries (volume 3, p. 439). See, also, Bealey v. Shaw, 6 East, 208; Agawam Canal Co. v. Edwards, 36 Conn. 497; Williams v. Morland, 2 Barn. & C. 913; Mason v. Hill, 5 Barn. & Adol. 1; Tillotson v. Smith, 32 N. H. 95. But as between different proprietors on the same stream, the right of each qualifies that of the other, and the question always is, not merely whether the lower proprietor suffers damage by the use of the water above him, nor whether the quantity flowing on is diminished by the use, but whether under all the circumstances of the case the use of the water by one is reasonable and consistent with a correspondent enjoyment of right by the other. "Each proprietor is entitled to such use of the stream, so far as it is reasonable, conformable to the usages and wants of the community, and having regard to the progress of improvements in hydraulic works, and not inconsistent with a like reasonable use by the other proprietors of land on the same stream above and below." Shaw, C. J., in Cary v. Daniels, 8 Metc. (Mass.) 477. "The common use of the water of a stream by persons having mills above is frequently, if not generally, attended with damage and loss to the mills below; but that is incident to that common use, and for the most part unavoidable. If the injury is trivial, the law will not afford redress, because every person who builds a mill does it subject to this contingency. The person owning an upper mill on the same stream has a lawful right to use the water, and may apply it in order to work his mills to the best advantage, subject, however, to this limitation: that if in the exercise of this right, and in consequence of it, the mills lower down the stream are rendered useless and unproductive, the law in that case will interpose and limit this common right so that the owners of the lower mills shall enjoy a fair participation." Woodworth, J., in Meritt v. Brinkerhoff, 17 Johns. 321. It is a fair participation and a reasonable use by each that the law seeks to protect. Such interruption in the flow "as is necessary and unavoidable by the reasonable and proper use of the mill privilege above" cannot be the subject of an action. Chandler v. Howland, 7 Gray, 350. And see Embrey v. Owen, 6 Exch. 353; Hetrich v. Deachler, 6 Pa. St. 32; Hartzall v. Sill, 12 Pa. St. 248; Pitts v. Lancaster Mills, 13 Metc. (Mass.) 156; Bliss v. Kennedy, 42 Ill. 68. As was said by Mr. Justice Story in Tyler v. Wilkinson, 4 Mason, 401, Fed. Cas. No. 14,312, to hold that there can be no diminution whatever, no obstruction or impediment whatsoever, by a riparian proprietor in the use of water as it flows, would be to deny any valuable use of it. There may be and there must be allowed of that which is common to all a reasonable use by each. And, if further authorities are important, Palmer v. Mulligan, 3 Caines, 308; Dilling v. Murray, 6 Ind. 324; Snow v. Parsons, 28 Vt. 459; Hayes v. Waldron, 44 N. H. 580; Davis v. Getchell, 50 Me. 602; and Clinton v. Myers, 46 N. Y. 514,—may be referred to. It is therefore not a diminution in the quantity of the water alone, or an alteration in its flow, or either or both of these circumstances combined with injury, that will give a right of action, if in view of all the circumstances, and having regard to equality of right in others, that which has been done and which causes the injury is not reasonable. In other words, the injury that is incidental to a reasonable enjoyment of the common right can demand no redress.

We think the court erred also in declining to instruct the jury on defendant's request that in determining the question of reasonable use by the defendant they might consider, among other things, the general usage of the country in similar cases. As was said in Gould v. Duck Co., 13 Gray, 452: "Usage is some proof of what is considered a reasonable and proper use of that which is a common right, because it affords evidence of the tacit consent of all parties interested to the general convenience of such use." And see Thurber v. Martin, 2 Gray, 394; Snow v. Parsons, 28 Vt. 459. Indeed in most cases this proof is the most satisfactory and conclusive that could be adduced, being established by the parties concerned, who understand better than any others what is reasonable and convenient,

and who would not be likely to acquiesce in any thing which was not so.

These errors render it necessary to order a new trial. Some of the rulings on the admission of evidence seem to have been very liberal, but we are not satisfied that they exceeded the bounds of judicial discretion.

The judgment will be reversed, with costs, and a new trial ordered.

The other justices concurred.

POTTER v. INDIANA & L. M. RY. CO.

(54 N. W. 956, 95 Mich. 389.)

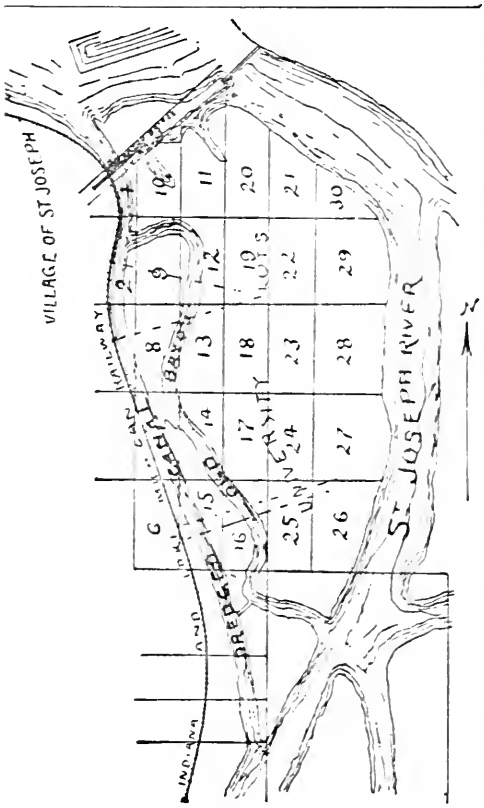
Supreme Court of Michigan. April 21, 1893.

Error to circuit court, Berrien county; Thomas O'Hara, Judge.

Action by Calvin B. Potter against the Indiana & Lake Michigan Railway Company to recover damages for obstructing an alleged navigable stream. From a partial judgment for plaintiff, both parties appeal. Reversed.

C. B. Potter, Jr., and George S. Clapp, for plaintiff. David Strouse and Edward Bacon, for defendant.

GRANT, J. Plaintiff is the owner of an undivided half interest in five university lots, numbered 14, 16, 17, 24, and 25, located in a marsh on the left bank of the St. Joseph river, near its mouth. Each lot contains five acres. The lots were situated on section 24, township 4 S., range 19 W., and, with 25 similar lots, comprised the S. W. ¼ of said section. This land was granted by the United States to the state of Michigan for university purposes, and in 1842 was divided and platted into lots for sale. Plaintiff became the purchaser in 1881. The defendant's road was constructed in 1888. In October, 1890, the defendant and the township of St. Joseph made a contract for the construction of a viaduct, which is the subject of this controversy, and which was constructed according to the contract, and accepted by the municipality. The village of St. Joseph is situated on the high ground on the left bank of the river, directly opposite the viaduct. The village of Benton Harbor is situated on the high ground on the right bank of the river. These two villages, in 1890, had a population of over 7,000. Across the river is a bridge with a swing. The viaduct and the bridge across the river are a part of the only public highway between the two villages. The viaduct is required by public convenience and necessity. It is over a bayou which was originally connected with the river upon the north, and is now extended to the river upon the south. The old bayou was crooked, and extended across plaintiff's lots 14 and 16. In 1881 a canal was dredged, by private subscription, to the westward of the old bayou, from a point on lot 2 northward to the river. The old bayou is connected with this canal near the northerly side of lot 2. The situation will appear upon the accompanying plat.



The viaduct is situated upon lot 1, 100 rods distant from plaintiff's nearest lot. The clear space between the water and the viaduct is 24½ feet, and its width 40 feet. In 1842 a bridge was constructed across the St. Joseph river for a territorial road, and one across this same bayou for the same road, on lot 1. This bridge was lower than the present viaduct, had no draw or swing, and existed for more than 30 years. In the original surveys by the United States government, this bayou was unmeandered. In 1881, when the canal was dug, the old bridge was removed, and a swing put in its place, about eight feet above the water. At this time the old bayou, to whatever extent it may have been used prior to that for navigation, was evidently abandoned. In September, 1891, by actual measurement, the depth of the water in this old bayou, where it empties into the canal, was 2 feet; at the corner of lots 9, 10, 11, and 12, it was 4½ feet; at the corner of 9, 8, 13, and 12, it was 3 feet; at the corner of 7, 8, 13, and 14, it was 2½ feet; at the corner of 14, 15, 16, and 17, it was 2 feet; and across lot 16, it was 18 inches. The old bayou, originally, did not extend to the river upon the south, but was plowed and scraped out by the highway commissioners to afford an escape for the surplus water from the river, which, with the ice, was dangerous to the bridge below. The river itself is a navigable stream, and was once quite extensively used, but is now practically abandoned for that purpose. A mile above the viaduct is another bridge across the river, which has existed for many years, has no swing, and is considerably lower than the viaduct. No wharves, manufactories, or buildings of any kind have ever been constructed on any of these low lands above the viaduct, except a mill, which was erected on the west side of the canal, but was a failure, and was long ago abandoned. There has been no navigation,

of any consequence, for many years, in the canal above the viaduct. The swing bridge had become somewhat impaired, and three months before the contract for the construction of the viaduct the public authorities caused it to be permanently fastened so as to prevent any attempt to swing it. The only use made of the bayou or canal above the viaduct, according to the plaintiff's own testimony, is that, while this factory was running, material was taken to it on scows or lighters. He had also seen one small river steamer go through. He thought this steamer went through the channel while the river bridge was being built, and, according to his recollection, he had seen sailing vessels in the bayou, south of the viaduct. Plaintiff, in his declaration, alleges that this bayou is a navigable stream; that the viaduct obstructs its use, and has thereby depreciated the value of his lots. He recovered a verdict of $300.

1. Plaintiff cannot maintain this action unless he has shown that he has sustained some special or peculiar damage, separate and distinct from that sustained by the public at large. Gould, Waters, §§ 122, 128, and authorities there cited; Blackwell v. Railroad Co., 122 Mass. 1; O'Brien v. Railroad Co., 17 Conn. 373. There is no testimony to sustain the claim that the old bayou is a navigable stream. Even if the canal were navigable, none of the plaintiff's lands adjoin it. He therefore has no interest except that possessed by the public in common, viz. the right to the use of the stream as a public highway. If he may maintain the action, so may any other landowner living above the viaduct. Under these circumstances, the only course open to him was to apply to the proper public authorities to take proceedings to abate the structure as a public nuisance.

2. Plaintiff has shown no special damages, even if the old bayou which reaches his land were a navigable stream. He alleges in his declaration that his lands were suitable for dockage, warehousing, manufacturing, lumber and coal yards, and such other purposes as are common in connection with shipping and freighting business. It is evident that they are useful for no other purpose. Whether there will ever be a demand for them for such purposes is problematical. His damages, therefore, are purely speculative.

3. The canal was purely a private enterprise, and the public never obtained any rights, by prescription or otherwise, in it. It was constructed mainly on account of the erection of the mill on lot 6. There was but little, if any, occasion for its use after that enterprise failed. Whatever use was made of it did not constitute it a public highway. It was like a private road constructed and maintained at private expense, over which the public is permitted to travel, but in which it obtains no vested rights. Judgment is reversed, and judgment entered in this court for the defendant, with costs of both courts.

MONTGOMERY, J., did not sit. The other justices concurred.

McAVOY v. MEDINA.

(11 Allen, 548.)

Supreme Judicial Court of Massachusetts. Essex. Jan. Term, 1866.

At the trial in the superior court, before Morton, J., it appeared that the defendant was a barber, and the plaintiff, being a customer in the defendant's shop, saw and took up a pocket-book which was lying upon a table there, and said, "See what I have found." The defendant came to the table and asked where he found it. The plaintiff laid it back in the same place, and said, "I found it right there." The defendant then took it and counted the money, and the plaintiff told him to keep it, and if the owner should come to give it to him, and otherwise to advertise it, which the defendant promised to do. Subsequently the plaintiff made three demands for the money, and the defendant never claimed to hold the same till the last demand. It was agreed that the pocket-book was placed upon the table by a transient customer of the defendant, and accidentally left there, and was first seen and taken up by the plaintiff, and that the owner had not been found.

The judge ruled that the plaintiff could not maintain his action, and a verdict was accordingly returned for the defendant, and the plaintiff alleged exceptions.

E. J. Sherman & J. C. Sanborn, for plaintiff. D. Saunders, Jr., for defendant.

DEWEY, J. It seems to be the settled law that the finder of lost property has a valid claim to the same against all the world except the true owner, and generally that the place in which it is found creates no exception to this rule. 2 Pars. Cont. 97: Bridges v. Hawkesworth, 7 Eng. Law & Eq. 424.

But this property is not, under the circumstances, to be treated as lost property in that sense in which a finder has a valid claim to hold the same until called for by the true owner. This property was voluntarily placed upon the table in the defendant's shop by a customer of his who accidentally left the same there and has never called for it. The plaintiff also came there as a customer, and first saw the same and took it up from the table. The plaintiff did not by this acquire the right to take the property from the shop, but it was rather the duty of the defendant, when the fact became thus known to him, to use reasonable care for the safe-keeping of the same until the owner should call for it. In the case of Bridges v. Hawkesworth the property, although found in a shop, was found on the floor of the same, and had not been placed there voluntarily by the owner; and the court held that the finder was entitled to the possession of the same, except as to the owner. But the present case more resembles that of Lawrence v. State, 1 Humph. 228, and is indeed very similar in its facts. The court there take a distinction between the case of property thus placed by the owner and neglected to be removed, and property lost. It was there held that "to place a pocket-book upon a table and to forget to take it away is not to lose it, in the sense in which the authorities referred to speak of lost property."

We accept this as the better rule, and especially as one better adapted to secure the rights of the true owner.

In view of the facts of this case, the plaintiff acquired no original right to the property, and the defendant's subsequent acts in receiving and holding the property in the manner he did does not create any. Exceptions overruled.

HAMAKER v. BLANCHARD.

(90 Pa. St. 377.)

Supreme Court of Pennsylvania. May 27, 1879.

Assumpsit to recover money found by a servant in a hotel parlor, and delivered by her to the proprietor to be returned to the owner, but who was never found.

H. J. Culbertson, for plaintiff in error. J. A. McKee, for defendants in error.

TRUNKEY, J. It seems to be settled law that the finder of lost property has a valid claim to the same against all the world except the true owner, and generally that the place in which it is found creates no exception to this rule. But property is not lost in the sense of the rule, if it was intentionally laid on a table, counter, or other place, by the owner, who forgot to take it away, and in such case the proprietor of the premises is entitled to retain the custody. Whenever the surroundings evidence that the article was deposited in its place, the finder has no right of possession against the owner of the building. McAvoy v. Medina, 11 Allen (Mass.) 548. An article casually dropped is within the rule. Where one went into a shop, and, as he was leaving, picked up a parcel of banknotes, which was lying on the floor, and immediately showed them to the shopman, it was held that the facts did not warrant the supposition that the notes had been deposited there intentionally, they being manifestly lost by some one, and there was no circumstance in the case to take it out of the general rule of law that the finder of a lost article is entitled to it as against all persons except the real owner. Bridges v. Hawkesworth, 7 Eng. Law & Eq. 424.

The decision in Mathews v. Harsell, 1 E. D. Smith, 393, is not in conflict with the principle, nor is it an exception. Mrs. Mathews, a domestic in the house of Mrs. Barmore, found some Texas notes, which she handed to her mistress, to keep for her. Mrs. Barmore afterwards entrusted the notes to Harsell, for the purpose of ascertaining their value, informing him that she was acting for her servant, for whom she held the notes. Harsell sold them, and appropriated the proceeds; whereupon Mrs. Mathews sued him and recovered their value, with interest from date of sale. Such is that case. True, Woodruff, J., says: "I am by no means prepared to hold that a house servant who finds lost jewels, money, or chattels in the house of his or her employer acquires any title even to retain possession against the will of the employer. It will tend much more to promote honesty and justice to require servants in such cases to deliver the property so found to the employer, for the benefit of the true owner." To that remark, foreign to the case as understood by himself, he added the antidote: "And yet the court of Queen's bench in England have recently decided that the place in which a lost article is found does not form the ground of any exception to the general rule of law that the finder is entitled to it against all persons except the owner." His views of what will promote honesty and justice are entitled to respect, yet many may think that Mrs. Barmore's method of treating servants is far superior.

The assignments of error are to so much of the charge as instructed the jury that, if they found the money in question was lost, the defendant had no right to retain it because found in his hotel, the circumstances raising no presumption that it was lost by a guest, and their verdict ought to be for the plaintiff. That the money was not voluntarily placed where it was found, but accidentally lost, is settled by the verdict.

It is admitted that it was found in the parlor, a public place open to all. There is nothing to indicate whether it was lost by a guest, or a boarder, or one who had called with or without business. The pretense that it was the property of a guest, to whom the defendant would be liable, is not founded on an act or circumstance in evidence.

Many authorities were cited in argument, touching the rights, duties, and responsibilities of an innkeeper in relation to his guests. These are so well settled as to be uncontroverted. In respect to other persons than guests, an innkeeper is as another man. When money is found in his house, on the floor of a room common to all classes of persons, no presumption of ownership arises; the case is like the finding upon the floor of a shop. The research of counsel failed to discover authority that an innkeeper shall have an article which another finds in a public room of his house, where there is no circumstance pointing to its loss by a guest. In such case the general rule should prevail. If the finder be an honest woman who immediately informs her employer, and gives him the article on his false pretense that he knows the owner and will restore it, she is entitled to have it back and hold it until the owner comes. A rule of law ought to apply to all alike. Persons employed in inns will be encouraged to fidelity by protecting them in equality of rights with others.

The learned judge was right in his instructions to the jury. Judgment affirmed.

See Bowen v. Sullivan, 62 Ind. 281.

WATTS et al. v. WARD.

(1 Or. 86.)

Supreme Court of Oregon. June, 1854.

The parties emigrated to Oregon in 1852. Ward lost two horses in the Indian country, and plaintiff in error found and recognised them as belonging to plaintiff. They took the horses to bring and deliver, as they said, to Ward, when he should pay them for their trouble, but used them on the road for driving cattle, hunting buffalo, etc. They also permitted another emigrant to use one of the horses two months. One of the horses died on the journey, and the other in the following winter. The testimony differed as to whether the horses died from hard usage or sickness, but both died in possession of plaintiffs in error. The court instructed the jury, in substance, that the defendants had a right to take up the horses, and use them as much as was necessary and proper to bring them to plaintiff, but had no right to use them for their own benefit, or for purposes other than the bringing of them to the owner. Verdict and judgment for Ward for $160.

M. Chinn, for plaintiffs in error. Jas. McCabe, for defendant in error.

WILLIAMS, C. J. The instruction of the court, it is said, was erroneous. No doctrine is better settled at common law than that the finder of lost property is not entitled to a reward for finding it, if there be no promise of such reward by the owner. Brinstead v. Buck, 2 Bl. R. 1117; Nicholson v. Chapman, 2 H. Bl. R. 254; 2 Kent. Comm. 356; 5 Metc. 352. Some of the authorities maintain that the finder of lost property is entitled to recover from the owner thereof his necessary and reasonable expenses in the finding and restoration of said property. Amory v. Flinn, 10 Johns. 102; 2 Kent. Comm. 356. Other authorities seem to take the ground that the finder has no legal right to anything from the owner for his trouble and expense in finding lost property. Brinstead v. Buck, Nicholson v. Chapman, before cited, appear to stand upon this principle. Chief Justice Eyre, speaking upon this subject in the latter case, says: "Perhaps it is better for the public that these voluntary acts of benevolence from one man to another, which are charities and moral duties, but not legal duties, should depend altogether for their reward upon the moral duty of gratitude." Chief Justice Shaw, in Wentworth v. Day, 3 Metc. (Mass.) 352, says that "the finder of lost property on land has no right of salvage at common law." Where one person gratuitously performs an act of kindness for another, the law, as a general rule, does not recognise the right to a compensation for such act. In the case of Holmes v. Tremper, 20 Johns. R. 28, it was held that the plaintiff was not entitled to any recompense for services rendered in saving defendant's property from fire, because such services were entirely voluntary, and without any expense or implied promise on the part of defendant to pay for them. No person is bound in law to take trouble with property which he finds; and if, without any knowledge of the owner's wishes, he does incur expense on account of such property, does he not in so doing trust the liberality of the owner, rather than the force of law, for it may be that such owner did not desire to have his property disturbed, or, if lost, preferred to find it himself? Much of the stock in this country is permitted to run at large; and if every animal lost, or appearing to be lost, can be taken up, and the owner thereof legally charged for all trouble and expense thereby incurred, the business of finding cattle would certainly become profitable, and persons might be largely involved in debt without their knowledge or consent. Where a reward is offered for lost property, the finder, when he complies with the terms of the offer, has a right to retain the property in his hands until the promised reward is paid to him. Wentworth v. Day, 3 Metc. (Mass.) 352. Persons are apt to offer a reward if they wish to pay for the finding of lost property. All the authorities make a difference between the finding of property lost at sea and the finding of property lost on land. Commercial policy allows salvage in the one case, because there is peril in the finding, and immediate destruction threatens the property; in the other case there is no peril, and generally no danger that the property will be destroyed. But, if it be admitted that the owner of lost property is bound to remunerate the finder for his trouble and expense in the finding, it is certain that such finder cannot pay himself as he goes along by using the property for that purpose. He cannot be permitted to judge as to how much his demand for trouble and expense shall be, and then as to how much he ought to use the property to satisfy such demand. The owner has rights in these matters, and must be consulted.

Let the property, when found, be returned to the owner, and then the amount and mode of compensation, if any, can be determined. Plaintiffs in this case having treated and used the horses as their own, for their own benefit and gain, defendant had a right to charge them with a conversion of the property, and maintain his suit for its value. Judgment affirmed.

CHASE v. CORCORAN.[1]

(106 Mass. 286.)

Supreme Judicial Court of Massachusetts. Middlesex. Jan. Term, 1871.

A. V. Lynde and C. Abbott (E. W. Sanborn with them) for plaintiff.

GRAY, J. The evidence introduced at the trial tended to prove the following facts: The plaintiff, while engaged with his own boats in the Mystic river, within the ebb and flow of the tide, found the defendant's boat adrift, with holes in the bottom and the keel nearly demolished, and in danger of sinking or being crushed between the plaintiff's boats and the piles of a bridge, unless the plaintiff had saved it. The plaintiff secured the boat, attached a rope to it, towed it ashore, fastened it to a post, and after putting up notices in public places in the nearest town, and making other inquiries, and no owner appearing, took it to his own barn, stowed it there for two winters, and during the intervening summer made repairs (which were necessary to preserve the boat), and for its better preservation put it in the water, fastened to a wharf, and directed the wharfinger to deliver it to any one who should prove ownership and pay the plaintiff's expenses about it. The defendant afterwards claimed the boat; the plaintiff refused to deliver it unless the defendant paid him the expenses of taking care of it; and the defendant then took the boat by a writ of replevin, without paying the plaintiff anything. This action is brought to recover money paid by the plaintiff for moving and repairing the boat, and compensation for his own care and trouble in keeping and repairing the same, amounting to $26 in all. * * *

The plaintiff requested the chief justice of the superior court to rule that the boat was not lost goods, within the sense of Gen. St. c. 79. But the learned judge refused so to rule, and ruled that upon all the evidence the plaintiff could not maintain his action, and directed a verdict for the defendant. We are of opinion that this was erroneous. * * *

The claim of the plaintiff is therefore to be regulated by the common law. It is not a claim for salvage for saving the boat when adrift and in danger on tide water, and does not present the question whether the plaintiff had any lien upon the boat, or could recover for salvage services in an action at common law. His claim is for the reasonable expenses of keeping and repairing the boat after he had brought it to the shore; and the single question is whether a promise is to be implied by law from the owner of a boat, upon taking it from a person who has found it adrift on tide water and brought it to shore, to pay him for the necessary expenses of preserving the boat while in his possession. We are of opinion that such a promise is to be implied. The plaintiff, as the finder of the boat, had the lawful possession of it, and the right to do what was necessary for its preservation. Whatever might have been the liability of the owner if he had chosen to let the finder retain the boat, by taking it from him he made himself liable to pay the reasonable expenses incurred in keeping and repairing it. Nicholson v. Chapman, 2 H. Bl. 254, 258, and note; Amory v. Flyn, 10 Johns. 102; Tome v. Four Cribs of Lumber, Taney, 533, 547, Fed. Cas. No. 14,083; 3 Dane, Abr. 143; Story, Bailm. §§ 121a, 621a; 2 Kent, Comm. (6th Ed.) 356; 1 Domat, pt. 1, lib. 2, tit. 9, art. 2; Doct. & Stud. c. 51; Preston v. Neale, 12 Gray, 222. Exceptions sustained.

See Reeder v. Anderson's Adm'rs, 4 Dana, 193.

[1] Irrelevant parts omitted.

WOOD et al. v. PIERSON.[1]

(7 N. W. 888, 45 Mich. 313.)

Supreme Court of Michigan. Jan. 19, 1881.

Hatch & Cooley, for plaintiffs in error. Shepard & Lyon, for defendant in error.

GRAVES, J. * * * Pierson lost at Bay City, July 18, 1878, a small diamond pin, which seems to have separated from the tongue in some unknown way. The circumstances of the loss and the manner in which the body of the pin and tongue became disunited are left unexplained. The metallic setting was a common pattern, and the gem had no peculiarities to facilitate its identification by nonexperts. Pierson caused a notice to be inserted in the Tribune newspaper published in the city, of this tenor: "Lost. $25.00 Reward—Lost. A diamond pin. The finder will be paid the above reward by leaving the same at this office." As will be observed, the advertisement neither gave a description of the pin, nor suggested who offered the reward. Moreover, no means of any kind were provided for showing at the newspaper office the ownership or identity of the pin, or for connecting any pin which might be produced with the claim contained in the notice, nor was any money left with which to pay the reward, nor any provision whatever made for paying it there.

Chapman found a pin which was subsequently ascertained to be the one in question. His first impression was, when he picked it up, that it was a cheap trinket, but on second thought he decided to show it to a jeweler. Dirt was adhering to it, and attention was at once drawn to the fact that, although the tongue was wholly missing, the rivet was secure and firmly in its place. The query naturally arose as to how this condition of the pin and the absence of the tongue might be accounted for. But in order to find out whether it had any material value, Chapman took it immediately to Wood, the other defendant, he being a jeweler, and was by him told that the stone was a diamond, and that a diamond pin had been advertised in the Tribune.

On getting this information, Chapman went at once to the newspaper office and saw Mr. Shaw, the editor and manager, who showed him the advertisement and informed him who the author was. Mr. Shaw referred him for anything further to Mr. Pierson, and he at once carried the pin to Pierson's store and called for that gentleman. He was absent. Chapman was going from the city the next morning, and he told a clerk, Mr. Martin, that he had found a pin, and as he was going away he would leave it at Mr. Wood's to be identified and returned to the owner. He then went to Wood's and there left it with instructions to give it to the person who should identify it and pay the reward, and to no one else. This was Friday evening, July 26th. The next morning he went from the city on business, and only returned the Monday following at noon. During his absence Pierson called on Wood and asked to see the pin in order to identify it, and Wood declined and required him to identify it first. Pierson attempted to do so, but he failed to satisfy Wood, and in the judgment of another jeweler to whom both referred, and who had the advantage of inspecting both the tongue and body of the pin and of comparing them, the physical appearances and indications were strongly against Pierson's claim.

* * * * * *

According to the common law the finder of goods lost on land becomes proprietor in case the true owner does not appear. And meanwhile his right as finder is a perfect right against all others. But if the true owner does appear, whatever right the finder may have against him for recompense for the care and expense in the keeping and preservation of the property, his status as finder only does not give him any lien on the property. Yet if such owner offer a reward to him who will restore the property, a lien thereon is thereby created to the extent of the reward so offered. This doctrine in favor of a lien in such circumstances is so laid down in Preston v. Neale, 12 Gray, 222, and authorities are cited for it. Among them is the leading case of Wentworth v. Day, by Chief Justice Shaw, reported in 3 Metc. 352, and which is approved and followed by the supreme court of Pennsylvania in Cummings v. Gann, 52 Pa. St. 484, adopted as correct by Story in his work on Bailments (sections 121a and 621a). Parsons has given it his sanction by incorporating it in the text of his work on Contracts (volume 3, p. 239, 6th Ed.), and Edwards presents it as settled law in his treatise on Bailments (sections 20, 68, 6th Ed.).

Under this principle the admission is unavoidable that when Pierson claimed the pin, on the footing of his notice and reward, of Chapman, the finder, who was holding it for the actual owner, it was, as between them, subject to a lien in Chapman's favor and against Pierson for the reward. According to the language of the books Chapman was entitled to detain the article from Pierson until the reward should be paid, and was under no legal obligation to relinquish possession to him, or to give it to another, or to allow anything to be done endangering his right or security. But there was a mutuality of rights. As claimant, Pierson was entitled to a reasonable time and to fair and reasonable opportunity in reference to the nature of the chattel, the existing state of things bearing on the transaction and the surrounding circumstances, and without impairing Chapman's right as contingent owner, nor his right of lien, nor interfering with his duty to the true ownership which might be subsequently asserted by another, to make such a showing as he could that the property was the same he had lost and advertised, and such evidence

[1] Irrelevant parts omitted.

as would satisfy a fair and reasonable person of the fact.

It was not for Chapman to baffle investigation by any unfair action or inaction, or to give way to unfounded and unreasonable suspicion, and then object that the evidence of identification was not sufficient. Nor was it for Pierson to demand anything which was not fair and just under the circumstances, and needful for investigation, and consistent with Chapman's rights and duties, and then make its refusal a pretext for charging injustice, and an excuse for making costs; and in regard to these and similar matters it was for the jury to say what was the conduct of the parties; whether it was fair and reasonable or otherwise; whether either or both materially deviated from the proper course; whether the kind of reciprocity the occasion called for was shown or not, and whether Chapman was bound or not to be satisfied of the rectitude of Pierson's claim when the suit was begun.

* * * * * *

In Isaac v. Clark, 2 Bulst. 306, Lord Coke states the law in this wise: "When a man doth finde goods, it hath been said, and so commonly held, that if he doth dispossess himself of them, by this he shall be discharged, but this is not so, as appears by 12 Edw. IV. 13, for he which findes goods is bound to answer him for them who hath the property; and if he deliver them over to any one, unless it be to the right owner, he shall be charged for them, for at the first it is in his election, whether he will take them or not into his custody; but when he hath them, one onely hath then right unto them, and therefore he ought to keep them safely; if a man therefore which findes goods, if he be wise, he will then search out the right owner of them, and so deliver them unto him; if the owner comes unto him and demands them, and he answers him, that it is not known unto him whether he be the true owner of the goods, or not, and for this cause he refuseth to deliver them, this refusal is no conversion, if he do keep them for him."

Lord Coke very clearly enforces the right and duty of the finder to be certain of the true owner before he makes delivery. As he is bound to hold for the true owner, and is liable in case of misdelivery, the law makes it his duty as well as his right, even when there is no reward, to "search out," or, in other language, find, the "right owner," or see to it that he submits to no other than the "right owner." Undoubtedly, if Chapman's conduct was such that a jury would, under the circumstances of the case, feel satisfied that he was actually perverse and unreasonable, and pursued a course which was adapted to baffle fair investigation, instead of maintaining the attitude of a man whose duty it was, in the quaint terms of Lord Coke, to "search out the right owner," it would be just to regard him as having detained the property unlawfully.

The neglect to tender the reward, if it was still claimed, could not defeat the action. Bancroft v. Peters, 4 Mich. 619.

The remedy of trover was originally given to enable the loser of goods to recover of the finder, and the principle has found recognition in one of the provisions of our action of replevin. Comp. Laws, § 6754. The statute expressly refers to a case where one party is found to have a lien and the other the general ownership, and the court is required to render such judgment as shall be just. The provision did not escape the attention of the court below. It was mentioned in the charge. The parties respectively ignored the statute concerning lost property and planted themselves on the common law, and hence there seems to be no occasion to notice the former.

The charge given by the learned judge was very elaborate. In some essential particulars it seems open to a construction not consistent with the views which are here explained. But it is not needful to specify the observations referred to.

It is enough to say now, that whatever may have been intended, the charge as we find it in the record must have been received by the jury as instructing them that the defendants were bound to submit the pin to the personal inspection of the plaintiff on his request, as a safe and proper expedient for the purpose of "searching out the right owner," and they could not have supposed that it was submitted to them to decide according to their own judgment of the circumstances whether the defendant ought or ought not to have allowed such inspection. The question was not for the bench, but for the jury, under suitable instructions.

The case has several features which demand a very strict adherence to the rule which restricts the province of the judge to the conveyance of such matters of law to the jury as the case calls for, and assigns to the jury the determination of all matters of fact. No doubt the unusual, if not unprecedented, characteristics of the litigation, and the ordinary hurry of a trial, may explain all of the incidents which on careful review appear to be incapable of support.

The result is that the judgment must be reversed, with costs, and a new trial granted.

MARSTON, C. J., and CAMPBELL, J., concurred.

BAKER v. STATE.

(29 Ohio St. 184.)

Supreme Court of Ohio. Dec. Term. 1876.

Error to probate court, Van Wert county.

On information in the probate court of Van Wert county (a court having jurisdiction of misdemeanors), the defendant was convicted of the offense of petit larceny. At the trial a bill of exceptions was taken, setting out all the testimony, and this writ is prosecuted to reverse the judgment below, on the ground that the conviction was contrary to the law and the evidence.

Alexander & Saltzgaber, for plaintiff in error.

McILVAINE, J. The testimony offered on the trial below shows that on the evening of April 28, 1872, the defendant below found on a county public road, at Van Wert county, a pocketbook, containing one ten dollar bill, at a point in the road near which he had been engaged at work during the day, and that the goods found had been lost by the owner, Hinton Alden, at that point a few hours before. That Alden, at the time he lost the pocketbook, had been detained at that point for a short time, and within plain sight of the defendant. On the next morning, Alden, who lived in the immediate neighborhood, informed the defendant of his loss, but defendant concealed the fact of finding, and afterwards expended the money in the purchase of clothing. A few days after, the defendant admitted to a witness in the case that he had found the pocketbook, and that he knew the owner; and on inquiry why he had not returned the goods to the owner, replied that "Finders are keepers." It was also shown by an admission of defendant that the appearance of the pocketbook at the time he found it indicated that it had been very recently lost.

The law of this case is well stated by Baron Parke, in Reg. v. Thurborn, 1 Dennison, Crown Cas. 387, also reported under the name of Reg. v. Wood, 3 Cox Crown Cas. 453, thus: "If a man find goods that have actually been lost, or are reasonably supposed by him to have been lost, and appropriates them with intent to take the entire dominion over them, really believing when he takes them that the owner cannot be found, it is not larceny. But if he takes them with like intent, though lost or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny."

The fact, in this case, that the defendant expended the money after he had certain knowledge of the owner, did not render him guilty of larceny, if the offence was not complete before. The loss and finding of the goods were not disputed in the court below, but the following questions were made: 1. When the defendant first took the goods upon the finding, did he intend to appropriate them to his own use? This question was fairly found against him, from the fact of concealing the finding when informed by the owner of his loss, and from his subsequent declaration that "Finders are keepers." 2. Did he have reasonable grounds to believe at the time of finding the goods, that the owner could be found? It was sufficiently proved that the defendant knew that the goods had been recently lost before the finding, and that Alden had recently been at the point where he found them. These facts constituted reasonable ground for believing that Alden was the owner. Judgment affirmed.

PICKERING v. MOORE.

(32 Atl. 828.)

Supreme Court of New Hampshire. Merrimack. March 16, 1894.

Action by Lucian Pickering against Lydia A. Moore. Judgment for plaintiff.

Facts found by the court: March 31, 1883, the defendant leased his farm for the term of three years to the plaintiff, who covenanted to carry on the place in a husband-like manner, and to consume and convert into manure, to be used or left upon the premises, all hay and fodder raised thereon. The plaintiff occupied the farm, and performed all his covenants contained in the lease, without any new or further contract, until May 30, 1892. During the last year of his occupancy he fed out upon the farm a large quantity of fodder not produced on the place. He put 25 cords of the manure made from this fodder, and manure of the same quality and value made from fodder raised on the place, together in a heap, where they were so intermixed that they could not be distinguished. The defendant prevented him from taking away the 25 cords.

Leach & Stevens, for plaintiff. Albin & Martin, for defendant.

CARPENTER, J. The plaintiff held the farm after the expiration of three years as tenant from year to year, upon the terms expressed in the lease. Russell v. Fabyan, 34 N. H. 218, 223; Conway v. Starkweather, 1 Denio, 113. Manure made upon a farm by the consumption of its products in the ordinary course of husbandry is a part of the realty. It cannot be sold or carried away by a tenant without the landlord's consent. Sawyer v. Twiss, 26 N. H. 345, 349; Perry v. Carr, 44 N. H. 118, 120; Hill v. De Rochemont, 48 N. H. 87, 88. The doctrine "was established for the benefit of agriculture. It found its origin in the fact that it is essential to the successful cultivation of a farm that the manure produced from the droppings of cattle and swine fed upon the products of the farm, and composed with earth and vegetable matter taken from the land, should be used to supply the drain made upon the soil in the production of crops, which otherwise would become impoverished and barren, and in the fact that the manure so produced is generally regarded by farmers in this country as a part of the realty, and has been so treated by landlords and tenants from time immemorial." Haslem v. Lockwood, 37 Conn. 500, 505. Whether a tenant, "where there is no positive agreement dispensing with the engagement to cultivate his farm in a husband-like manner, is bound to spend the hay and other like produce upon it as the means of preserving and continuing its capacity" (Perry v. Carr and Hill v. De Rochemont, supra),—in other words, whether the express or implied obligation to cultivate the farm in a husband-like manner binds him, as matter of law, to convert into manure all the fodder grown on the premises,—is a different, and possibly an open, question (Wing v. Gray, 36 Vt. 261, 266, 267; Lewis v. Lyman, 22 Pick. 437, 444, 445; Middlebrook v. Corwin, 15 Wend. 169, and cases cited; Brown v. Crump, 1 Marsh. C. P. 567; Legh v. Hewitt, 4 East, 154, 159; Moulton v. Robinson, 27 N. H. 550, 561; Cooley, Torts, 334, 343, 344). However that may be, no rule of good husbandry requires a tenant to buy hay or other fodder for consumption on the farm. If, in addition to the stock maintainable from its products, he keeps cattle for hire, and feeds them upon fodder procured by purchase, or raised by him on other lands, the landlord has no more legal or equitable interest in the manure so produced than he has in the fodder before it is consumed. It is not made in the ordinary course of husbandry. It is produced "in a manner substantially like making it in a livery stable." Hill v. De Rochemont, 48 N. H. 87, 90; Corey v. Bishop, 48 N. H. 146, 148. It is immaterial whether the additional stock is kept for hire, or is the tenant's property. Needham v. Allison, 24 N. H. 355.

The plaintiff did not lose his property in the manure by intermixing it with the defendant's manure, of the same quality and value, without his consent. It is not claimed that the plaintiff mixed the manure with any fraudulent or wrongful intent. "The intentional and innocent intermixture of property of substantially the same quality and value does not change the ownership. And no one has a right to take the whole, but, in so doing, commits a trespass on the other owner. He should notify him to make a division, or take his own proportion at his peril, taking care to leave to the other owner as much as belonged to him." Ryder v. Hathaway, 21 Pick. 298, 306; Gilman v. Hill, 36 N. H. 311, 323; Robinson v. Holt, 39 N. H. 557, 563; Moore v. Bowman, 47 N. H. 494, 501, 502; Railroad Co. v. Foster, 51 N. H. 490, 493. "Even if the commingling were malicious or fraudulent, a rule of law which would take from the wrongdoer the whole, when to restore to the other his proportion would do him full justice, would be a rule not in harmony with the general rules of civil remedy, not only because it would award to one party a redress beyond his loss, but because it would compel the other party to pay, not damages, but a penalty." Cooley, Torts, 53, 54.

Whether the parties were tenants in common of the manure is a question that need not be determined. Gardner v. Dutch, 9 Mass. 427, 430, 431; Ryder v. Hathaway, 21 Pick. 298, 305; Chapman v. Shepard, 39 Conn. 413, 425; Kimberly v. Patchin, 19 N. Y. 330, 341. Assuming that they were, the action may be maintained. A tenant in common has the same right to the use and enjoyment of the common property that he

has to his sole property, except in so far as it is limited by the equal right of his cotenants. Where two have each an equal title to an indivisible chattel, "as of a horse, an oxe, or a cowe," neither, without actual and exclusive possession of the chattel, can enjoy his moiety. Simultaneous enjoyment by each of his equal right is impossible. Hence neither can lawfully take it from the possession of the other. The one excluded from possession has no legal remedy, except to take it "when he can see his time." Co. Litt. § 323; Southworth v. Smith, 27 Conn. 355, 359. A tenant in common of personal as well as real property has a right to partition, if partition is possible, and, if not, to a regulation of its use equivalent to partition, or to a sale. Co. Litt. 164, 165a; Stoughton v. Leigh, 1 Taunt, 402, 411, 412; Morrill v. Morrill, 5 N. H. 134, 135; Crowell v. Woodbury, 52 N. H. 613. On partition he is entitled to no particular part of the property, but only to his due proportion in value and quality of the whole. When it consists of chattels differing in quality and value, an appraisal of the value and consideration of the qualities of the several chattels are essential to an assignment to each of his just share. In this case, as in that of a single indivisible chattel, if the parties cannot agree upon the use, sale, or division, judicial intervention is necessary. Until an adjudication of their rights, neither can assert a title in severalty to any portion of the property. When the common property is divisible, by weight, measure, or number, into portions identical in quality and value, as corn and various other articles, a different case is presented. There is no question of legal or equitable right. There is, and can be, no dispute that a court of law or equity can settle. Counting, weighing, and measuring are not judicial, but ministerial, functions. Equity could do no more than decree that each might take so many pounds, bushels, or yards, or so many of the articles in number, and enforce its decree by process,—in other words, enforce the conceded right. One may, in general, do without a decree what equity would decree that he might do. Neither law nor equity allows one, in the exercise of his own rights, to do an unnecessary and avoidable injury to another. One is entitled to the possession of the whole in those cases only where it is necessary to his enjoyment of his moiety. Here it is not necessary. There is no more difficulty in separating one portion from another than there is in selecting A.'s marked sheep from B.'s flock. Either may make the division. The law is not so unreasonable as to compel a resort to the courts in order to obtain a partition which either may make without expense, and without danger of injustice to his cotenant. Except in Daniels v. Brown, 34 N. H. 454, it has never been held, so far as observed, that a tenant in common is liable to his cotenant, in any form of proceeding, for taking from the latter's possession, and consuming or destroying, his just proportion, only, of the common property. The conveyance by a tenant in common of a part of the common land by metes and bounds may effect a partition, and will if it does no injustice to his cotenants,—if their just share can be assigned to them out of the remaining land. Holbrook v. Bowman, 62 N. H. 313, 321. No reason is perceived why a similar doctrine should not be applied in the case of a common tenancy of chattels. If A. and B. own in common 100 horses, and B. sells 10 of them to C., why should A. be permitted to take them "when he can see his time," if he has possession of, and can have his full share assigned to him from, the remaining 90? However that may be, a tenant in common of goods divisible by tale or measure may, without the consent and against the will of his cotenant, rightfully take and appropriate to his sole use, sell, or destroy, so much of them as he pleases, not exceeding his share, and by so doing effect, pro tanto, a valid partition. To this extent, Daniels v. Brown, supra, is overruled. Haley v. Colcord, 59 N. H. 8; Gage v. Gage, 66 N. H. 282, 288, 29 Atl. 543; Selden v. Hickock, 2 Caines, 166; Lobdell v. Stowell, 51 N. Y. 70, and cases cited; Stall v. Wilbur, 77 N. Y. 158, 164; Cooley, Torts, 455; 6 Am. Law Rev. 455–459, and cases cited. The defendant, by preventing the plaintiff from taking his part of the manure, exercised a dominion over it inconsistent with the plaintiff's rights. Evans v. Mason, 64 N. H. 98, 5 Atl. 766. Judgment for the plaintiff.

WALLACE, J., did not sit. The others concurred.

See Wetherbee v. Green, 22 Mich. 311.

GATES v. RIFLE BOOM CO.

(38 N. W. 245, 70 Mich. 309.)

Supreme Court of Michigan. May 18, 1888.

Error to circuit court, Bay county; S. M. Green, Judge.

Samuel G. M. Gates brought an action of trover and conversion of a certain quantity of white pine saw-logs against the Rifle Boom Company. Judgment for defendant. Plaintiff brings error.

Holmes & Collins, for appellant. Hanchett & Stark, for appellee.

MORSE, J. The plaintiff, in his lumbering operations, in 1882 cut over the line upon the adjoining land of Rust Bros. & Co., and thereby secured and marked as his own about 135,000 feet of logs belonging to the latter. These logs were mixed with the other logs of plaintiff, and banked on the west branch of the Rifle river. They were not run out the following spring, but remained in the rollway during the summer and fall of 1883. In that year Rust Bros. & Co. sent some scalers where the plaintiff's logs were, who selected out, as best they could, logs of the same quality as those taken from the Rust lands by plaintiff, and about the same quantity, and marked them with the stamp of Rust Bros. & Co. Such logs then bore two brands, the mark of plaintiff, "C. O. W.," and the Rust mark, "7 R. 7." Under the usual contract by plaintiff with the defendant boom company these logs, intermingled with other logs of the plaintiff, were driven down the stream in the summer of 1884, and received in the defendant's boom. The defendant was notified by Rust Bros. & Co. not to deliver the logs with the double marks upon them to plaintiff. The boom company thereupon delivered the double-marked logs, about 155,000 feet, to Rust Bros. & Co., who, finding that more were marked by their scalers than they were entitled to, returned to plaintiff 20,590 feet of the same. The plaintiff, after demanding these logs of the boom company, and after its refusal to deliver them, brought this suit in trover in the circuit court for the county of Bay. The cause was there tried before a jury, and verdict and judgment passed for the defendant. The plaintiff in this court assigns as error the following instructions given by the court: "If the plaintiff cut the logs innocently, supposing them to be upon his own land, and mixed them with his own so that they could not be identified, and after they became mixed with his own, so that the logs cut from Rust Bros. & Co.'s lands could not be identified, then Rust Bros. & Co. had the right to select from the common mass a quantity of an average quality of their own, equal to the quantity taken from their land." And also, in the same connection, after having stated the rule as to willful trespasses, instructing the jury further as follows: "But a different rule prevails where a party innocently mingles his property with that of another, and where it is undistinguishable, and where the general quality and character of the property is the same, as in the case of the same kind of logs, white pine, if you please, and of the same general quality as near as may be. There, if the logs are confused, neither party loses his own. Both parties have a right to their own, and neither party being able to distinguish his own, the party whose property has been mingled with another's property by the act of that other party may take so much of the common mass as he has in it."

It was claimed by the plaintiff upon the trial, and he so testified, that the logs taken by Rust Bros. & Co. were of greater value in quality than those cut by him from their lands. The quantity cut by him on the Rust lands was not claimed to be less than the quantity taken by Rust Bros. & Co. It therefore became material to ascertain, upon the trial, whether the plaintiff was a willful trespasser, or cut the logs innocently, in good faith, believing that he was within the lines of his own land. The court instructed the jury as to the difference between a willful and an unintentional trespass, stating to them, in substance, that if the trespass was a willful one, if Gates knew he was cutting the logs of Rust Bros. & Co., and so, knowing them not to be his, intermingled them with his own that they could not be distinguished, Rust Bros. & Co. had a right to take more than their own, and if, in order to get all that belonged to them, and without intending to take more than belonged to them, they did take a better quality of logs than they had lost, if they did not make the selection with that view, the plaintiff could not recover for such excess in quality; but if the plaintiff cut the logs, and marked and mingled them with his own, in good faith, believing them to be his own, then, if Rust Bros. & Co. took more than they were entitled to, the plaintiff might recover the excess. The counsel for the plaintiff very ably and forcibly contended in the argument here that if the plaintiff was innocent of any wrong, he was entitled to recover in this action, if Rust Bros. & Co. took no more logs in quality or quantity than were cut upon their lands, the difference between the value of the logs and the value of the standing timber, that Rust Bros. & Co. could claim no more than the value of the stumpage. He argues that if Rust Bros. & Co., under the same circumstances, had sued the plaintiff in trover for the value of the timber so cut, the measure of damages would have been the value of the stumpage, and that they could not have recovered what they obtained in this suit, the value of the logs, representing not only the value of the standing timber, but also the worth of the labor of plaintiff added thereto. Citing Ayres v. Hubbard, 57 Mich. 322, 23 N. W. Rep. 829. The object of

the law being, in both cases, to enable the party, deprived of his property to receive compensation therefor, he asks, "Why should the man who strictly follows the law, and adopts a legal course of procedure" to obtain his property be in a worse position, and receive less than he who uses force or strategy to recover possession of his property? He claims that in this case the plaintiff added innocently to the value of this timber the cost of cutting and putting in the logs, which was the sum of $2.25 per thousand feet, and also the value of the driving and booming charges. He estimates this value at over $300. But in the first place it seems to me that this amount, the value of the plaintiff's labor and expenses upon the logs, could not be recovered in an action of trover. The logs were still the property of Rust Bros. & Co. The trespasser, however innocent, could acquire no property in these logs, nor could he acquire a lien upon them for such labor and expense. The conversion of trees into saw-logs by a trespasser does not change the title to the property, nor destroy the identity of the same. The owner of the land is the owner of the logs, and the trespasser has no title to them. Therefore when he regains his own, he has converted no property of the trespasser to his own use. Stephenson v. Little, 10 Mich. 433; Final v. Backus, 18 Mich. 218–232; Mining Co. v. Hertin, 37 Mich. 337; Arpin v. Burch, 68 Wis. 619, 32 N. W. 681; Winchester v. Craig, 33 Mich. 205; Grant v. Smith, 26 Mich. 201; Tuttle v. White, 46 Mich. 485, 9 N. W. 528. In the case of Mining Co. v. Hertin, 37 Mich. 337, the trespasser sought to recover in a special count in assumpsit for the value of his labor expended in cutting the wood. In this case, if any action would lie for the labor of cutting the logs and the expense of getting them into the stream and down to the boom it would seem that the plaintiff's remedy would be in assumpsit. But in the case above referred to it was held that he could not recover the benefit of his labor at all. There can be no doubt that the rule is well settled in this state that if Rust Bros. & Co. had taken possession of these logs while they were lying upon their lands, they would have been entitled to them as they were, and that no claim could have been made against them by the plaintiff for the labor and expense of cutting them. The identity of the timber would not then have been destroyed, and the subsequent intermingling of these logs with the logs of plaintiff, although innocently done, could not change the rights of the owners. The evidence shows that between the time Rust Bros. & Co. discovered the trespass and the time they took possession of the logs by marking them, no labor or money was expended by the plaintiff upon them. Therefore it follows that as this case stood the plaintiff had no claim upon Rust Bros. & Co. that he could enforce in this action, unless they took possession of a better quality of logs than he cut upon their premises and the same amount or more in quantity, and his trespass and intermingling of the property was innocently done. And the court was right in his interpretation of the law as to innocent trespassers. The seeming injustice pointed out in the argument of the plaintiff's counsel is not an injustice, but the result of the election of the owner to take less than he is by the law entitled to. The owner of standing timber is not only entitled to the timber, but he has a right to it as it is, and to keep it uncut if he so desires. No man, however innocently he may do it, can go upon his land and convert the standing trees into logs and charge him for the labor thus expended against his will, and perhaps against his real benefit. He may prefer to have the timber to stand, and if left standing a few years may bring him immense profit. Such instances have not been rare in the history of pine timber in this state. The supposed enhancement of his property by the labor of the trespasser may thus turn out to be a positive injury. There is no injustice in holding that the trespasser must lose the labor he has expended in converting another's trees into logs. Such trespasses, though casual and not willful, are ordinarily, as was the trespass in this case, the result of negligence upon the part of the trespasser, and there is no good reason why he should be recompensed for labor and expenses incurred in the trespass when it might have been avoided by proper diligence. The owner has the right to reclaim his logs, but if he sees fit to bring an action of trespass or trover instead of regaining his property he voluntarily puts himself within the rule of damages prevailing in such actions, and thereby elects to receive only a just and fair compensation for his property as it was before the trespasser intermeddled with it. The trespasser cannot complain of this, neither can he complain if he elects to take his property if he can find it. As was well said in Mining Co. v. Hertin, supra: "Nothing could more encourage carelessness than the acceptance of the principle that one who by mistake performs labor upon the property of another should lose nothing by his error."

The further and only question in the case is the alleged error of the circuit judge in rejecting the offer of the plaintiff to prove by Harvey Parker that while said Parker was foreman for the plaintiff, and was at work on the 80-acre tract adjoining the 40-acre tract claimed by Rust Bros. & Co., and before all of the logs had been hauled from the strip of real estate in dispute in this case, said McTavish and Gates then being at the camp, McTavish, while there, made no complaint or objection as to where they were cutting; made no claim that plaintiff and his men had committed a trespass; and in answer to a question by said Parker, after Gates had gone away, McTavish said the line plaintiff's men had cut

to was all right. And in sustaining the defendant's objection to the following question to the said Harvey Parker: "Did you have any talk with McTavish about the line to which you had cut?" the counsel for the plaintiff claims that this evidence was material and competent as bearing upon the good faith of the plaintiff in cutting the timber; that it does not appear from the verdict of the jury whether they found such trespass willful or not. It was conceded that Rust Bros. & Co. took about the quantity of logs they were entitled to, but if they took a much better quality, as plaintiff claimed they did, and the trespass was found by the jury to have been an innocent one, the plaintiff's counsel claims that there should have been and probably would have been a verdict in his favor for the value of the excess in quality so taken. In determining the competency and materiality of the proposed proof it will be necessary to enter somewhat into the facts of the trespass. McTavish was a land-looker, and a woodsman and general foreman, looking after the different lumber camps of Rust Bros. & Co., and looking after trespasses committed upon their lands, but not having any authority to locate or agree upon the boundaries of such lands. The plaintiff called upon McTavish, before he did any cutting, and asked him if he would go with him and see if they could not locate the line between his land and that of Rust Bros. & Co. He does not state that he supposed McTavish had any authority to locate the line. He says: "I had known him a good many years, and knew him as a man in the employ of the Rusts." "Question. You knew he was their agent and their woodsman? Answer. I believed him to be a good land-looker. I asked him if he would go with me and see if we could locate the line between 28 and 29 north, of the quarter post. He said he knew where the south section corner of the section was. We will go there and see if we can find it." They went up into the woods, and undertook to run out the line. They disagree somewhat in their testimony. As they were pacing on the supposed line the plaintiff did some blazing. McTavish testified that he forbade this blazing, saying to Gates that there was no telling whether they were right or not, as they were running the line out with a pocket compass. He says: "I told Mr. Gates at the time that there was timber enough along the line, whoever lumbered there first, to have that line established by a surveyor, and he made the remark then that that line would be just a guide for him when he went in there again to know about where he was;" and they agreed that it should be surveyed before it was lumbered. Gates testified that he blazed the line they ran out. That at one point McTavish said: "I don't know, we may not be just right here, and perhaps you hadn't better blaze." I says: "It will be a guide to us to know where we have come, and I will continue the blazing until you get to the corner." That McTavish said that he was satisfied that was the right line, and said further: "That line is as correct a line as we can get through here; but as timber is thick on the line down below between you and Rust you ought to have a surveyor run a compass course from this corner to this quarter post to be sure, as I have dodged a little in traveling north. We have come as straight as we could." To this, Gates says, he assented. No line, however, was run by a surveyor until after the cutting. Harvey Parker was the foreman of the plaintiff. McTavish was asked, on cross-examination, if he did not have a conversation with Parker about this line, and answered that he did not remember it, but said that he stayed one night at his camps and presumed he told Parker that the plaintiff had cut to the line that he and Gates ran. Denied ever stating to him that the cutting was all right, or that they had the right line. This conversation, if any was had, was after the cutting of the logs. The offered evidence of Parker was rejected at first by the court upon the ground that it was not competent because it took place after the cutting. Parker afterwards testified that at the time of the talk the timber was all cut off of this strip belonging to the Rusts, and that some of the logs had been taken off; that Gates was not present when the conversation took place; and there was no evidence offered to show that Gates ever knew of the talk. Thereupon the court ruled that it was not material. We think the court did not err in the ruling. McTavish had no authority to bind the Rusts, and what he might have said after the trespass was committed could have no bearing upon the question of the good faith of the plaintiff, especially when there was no evidence that Gates was informed of what McTavish said. Nor was it admissible as impeaching testimony not being material to the issue.

The judgment of the court below must therefore be affirmed, with costs.

SHERWOOD, C. J., and CHAMPLIN and LONG, JJ., concurred. CAMPBELL, J., did not sit.

FIRST NAT. BANK OF DENVER v. SCOTT.

(54 N. W. 987, 36 Neb. 607.)

Supreme Court of Nebraska. April 11, 1893.

Error to district court, Webster county; Cochran, Judge.

Action of replevin by the First National Bank of Denver against Henry C. Scott to recover a quantity of flour and feed. There was judgment for defendant, and plaintiff brings error. Affirmed.

J. S. Gilham and Case & McNeny, for plaintiff in error. St. Clair & McPheely, for defendant in error.

MAXWELL, C. J. On the 21st of December, 1888, the Red Cloud Milling Company executed a bill of sale to the plaintiff in error on "all the flour, feed, meal, and grain of all kinds, manufactured and unmanufactured, now in the mill, elevator, cribs, and warehouse of the Red Cloud Milling Company at Red Cloud, Nebraska, 100 head of steers, cows, and calves, now in the feed yards of the said milling company, one span of black mares, one set of double harness, one lumber wagon, all grain on track at Red Cloud, Nebr." At the time this bill of sale was executed there were about 60 tons of flour, and a large amount of bran and feed, in and attached to the mill. There seems to have been no immediate change of possession. Prior to the execution of the bill of sale the milling company had ordered several cars of wheat from the defendant in error, and on the 22d of that month one car was shipped by him to the milling company from Axtell, Neb., and was received on December 24th of that year, and a portion, at least, was ground into flour, and mixed with the other flour stored in the mill, and the like mixture seems to have been made of the wheat. The defendant in error thereupon commenced an action by attachment against the milling company to recover the value of the car of wheat, viz. 619 5-6 bushels of wheat at 90 cents per bushel, amounting to $557.85. The return of the sheriff on the order of attachment is as follows: "Dec. 29th, 1888. Received this order, and, according to the command thereof, I did on the same day, at 11 o'clock A. M. in the presence of H. H. Eckman and Wesley Street, two credible persons, residents of the county, attach the following goods and chattels, to wit: About 300 bushels of wheat, valued at 80c., $240; 1,050 50-lb. sacks of R. C. flour, $1.37½, $1,443.75; 20 50-lb. sacks of White Loaf at $1.62½, $32.50; 130 50-lb. sacks of New Deal at $1.00 per sack, $130,—and, after administering an oath to said H. H. Eckman and Wesley Street to make a true inventory and valuation of said property in writing, I then made an inventory and appraisement of said property, which is herewith returned. I also on the same day delivered to said defendants the Red Cloud Milling Co., by Dwight Jones, President, & R. D. Jones, Secy., a certified copy of this writ. After getting 1,200 sacks of flour I released all wheat, and it was turned back to Dwight Jones, president of the Red Cloud Milling Co. H. C. Scott, Sheriff. By J. C. Warner, Dept." The plaintiff in error thereupon brought an action of replevin, and reclaimed the property.

The defendant, in answer to the petition, alleged "that on or about the —— day of 188– the Red Cloud Milling Co., a corporation organized and doing business in and under the laws of the state of Neb., was indebted to A. G. Scott & Son in the sum of $1,000.35, in a cause of action arising upon the purchase by said Red Cloud Milling Co. of a quantity of wheat of the said A. G. Scott & Son, and on said last-named date the said A. G. Scott & Son commenced an action by attachment against the said Red Cloud Milling Co. in the district court of Webster county, Neb., and caused an order of attachment for the sum of $1,000.35 to be issued in said cause, and delivered to the defendant aforesaid, as sheriff, to levy; that under and by virtue of said order of attachment, and in pursuance of the command thereof, the defendant, as such sheriff, levied upon 1,050 sacks of wheat flour 'Red Cloud Brand,' 20 sacks of wheat flour 'White Loaf Brand,' and 130 sacks of wheat flour 'New Deal Brand,' being the goods and chattels mentioned in said petition herein, and took the same into his custody; that said flour was at the time of said levy, and still is, the sole property of the said Red Cloud Milling Co., and was liable to be levied upon for the satisfaction of said debt, and taken under said order of attachment for the satisfaction of the same; that said action is still pending and undecided in said district court; that the defendant, under and by virtue of said writ of attachment, held the possession of said flour until on or about the 27th day of March, 1889, when the same was taken from his possession and custody by C. Schenck, coroner of said Webster county, Neb., by virtue of a writ of replevin in this action. Wherefore defendant prays a return of said goods, or, if a return cannot be had, then for the value thereof to the extent of said order of attachment, to wit, $1,000.35, with interest and costs of suit." On the trial of the cause the jury returned a verdict in favor of the defendant in error for the sum of $557.85 and 1 cent damages. They also found the value of the property levied upon was $1,200.

1. A number of objections are made on behalf of the plaintiff in error to one of the instructions. In our view, however, these objections are not material, as it is evident that the verdict is the only one that should be rendered under the proof. It is clearly shown that a car of wheat containing 6,195 bushels was received and placed in the mill after the bill of sale was executed.

This was not covered by the bill of sale, and therefore the party using it is liable for its value. The plaintiff in error claims to have been in possession of the mill, and was running it, when the wheat was received, and therefore is liable for the same, and the jury so found. The case is simple, and did not require a volume of instructions for the guidance of the jury. Judgment was rendered in the attachment case in favor of the defendant in error before the trial in this case took place, and $347.50 appears to have been realized from the property attached therein. The judgment on the attachment in favor of the defendant in error, and against the milling company, was for the sum of $1,029.35 and costs, from which the sum of $347.50, amount due from garnishees, is to be deducted. The jury in the case at bar, however, found that as against the plaintiff in error the recovery should only be for the value of the car of wheat.

2. Objections are made to a general levy of the attachment upon the property of the plaintiff in error. We do not care to impute wrong motives to the plaintiff in error in appropriating the wheat. Where a confusion of goods is made fraudulently, by one who owns a part thereof, and after being made it is impossible to identify or apportion the property of each owner, the one not at fault will be entitled to the whole. This is upon the principle that a party, by wrongfully mixing the goods of another, cannot thereby deprive the other of his property, or profit by his own wrong. Therefore, it being impossible to separate the mass, he must lose the whole. Jewett v. Dringer, 30 N. J. Eq. 291. But forfeitures are not favored in law, and it must be an extreme case that will justify the taking of the property of one person, and giving it to another. Whenever it is possible, therefore, to make a division of the property, and give to each one his share, a court will make such division. Thus in Chandler v. De Graff, 25 Minn. 88, where the plaintiff delivered to the defendant about 20,000 railroad ties in excess of the contract, which the defendant refused to accept, but had mingled the same with those which were accepted so that they were undistinguishable, the plaintiff was permitted to take out of the mass of the ties the number of such excess. The same rule, in substance, was applied in Stone v. Quaale, (Minn.) 29 N. W. Rep. 326; Arthur v. Railway Co., 61 Iowa, 648, 17 N. W. Rep. 24; Inglebright v. Hammond, 19 Ohio, 337. Although the conversion of the wheat to flour was made without the consent of the defendant in error, yet the property in its changed form is susceptible of a fair division, and this seems to have been made by the jury. The property being susceptible of an equitable division, and being so divided, the plaintiff in error has no cause of complaint. The judgment is right, and is affirmed. The other judges concur.

See Starke v. Paine, 55 N. W. 185, 85 Wis. 633.

WOOD et al v. PACKER.

(17 Fed. 650.)

Circuit Court, D. New Jersey. July 14, 1883.

In equity.

F. C. Lowthorp, Jr., for complainant. James Buchanan, for defendant.

NIXON, J. This action is brought against the defendant for infringing certain reissued letters patent, No. 9,368, dated August 31, 1880. The Delaware Coal & Ice Company was the owner of the original patent, No. 73,684, and brought suit in this court against the same defendant for their infringement. It was found, upon examination, that although the patentee in his specifications stated the nature of his invention to consist in the funnel-shaped mouth attached to the cart, in combination with the chute and valve, he had failed to make any claim for such combination; and as none of the separate constituents, as set forth in the three claims, were new, the court was obliged to hold that the defendant was not shown to have infringed anything claimed in the complainant's patent. Since then the original patent has been surrendered, and a reissue obtained, with quite a different statement of the inventor's claims. They are as follows: (1) The combination of the body of a coal cart with a sliding extension chute, substantially as and for the purpose set forth; (2) the combination of the body of a coal cart and the outlet, having a gate or valve, with a sliding extension chute, adapted to the said outlet, substantially as specified.

The answer sets up three defenses: (1) That the reissue is void because the combination claimed is an expansion of the original; (2) want of novelty in the patent; (3) non-infringement.

The second is the only one of these defenses which seems to have merit, or which has been the occasion of any serious or extended inquiry. Do the specifications and claims of the patent as reissued indicate invention on the part of the patentee? The patent is for a combination, the constituents of which are stated in the claims above quoted. There is no difference, in fact, between the claims, except that the second has one element which is not named in the first, to-wit, the outlet, having a gate or valve, and which is the means of communication between the first and third constituents of the combination. Its absence gives much force to the argument of the learned counsel of the defendant, that the first claim is void because the parts are old, and there is no dependence or co-operation in their action whereby any new result is obtained. A mere aggregation of old things is not patentable, and, in the sense of the patent law, is not a combination. In a combination, the elemental parts must be so united that they will dependently co-operate and produce some new and useful result. A coal cart is not novel, nor is the chute for conducting coal from the cart to the place of its destination. These two instrumentalities are aggregated in the first claim; but no mechanism is suggested whereby the coal can be got out of the cart and into the chute. The complainant (Wood) testifies as a witness that it can be accomplished by the use of a man with a shovel. This is probably true; but it is difficult to see how the inventive faculty is put in exercise by any such arrangements. It is not necessary, however, to dwell upon this view of the case, because the entire reissue will not be avoided on account of the existence of one void claim. See Carlton v. Bokee, 17 Wall. 463.

The constituents of the second claim of the reissue are (1) the cart or wagon; (2) the outlet, with a gate or valve; and (3) the sliding extension chute. The patentee was asked whether he thought any of these elements, separated from the others, was novel, (Com. Rec. 28, 29,) and replied, "I do not think they are, but only in combination."

The case is then presented here which was considered by the supreme court in Hailes v. Van Wormer, 20 Wall. 368, and in which Mr. Justice Strong, speaking for the whole court, said: "All the devices of which the alleged combination is made are confessedly old. No claim is made for any one of them singly as an independent invention. It must be conceded that a new combination, if it produces new and useful results, is patentable, though all the constituents of the combination were well known and in common use before the combination was made. But the results must be a product of the combination, and not a mere aggregate of several results, each the complete product of one of the combined elements. * * * Merely bringing old devices into juxtaposition and then allowing each to work out its own effect, without the production of something novel, is not invention."

The question, then, is in regard to the second claim of the complainant's reissue: Is it a patentable combination, producing new and useful results, or is it a mere aggregation of old elements, each working out alone its single individual effect?

It is not a question of easy solution, for it requires us to find the exceedingly delicate line which divides patentability from simple mechanical skill, or to ascertain the difference between real invention and a double use or application of something that has existed before. Mr. Curtis, in section 41 of his treatise on the Law of Patents, in discussing this subject, says: "The subject-matter of a supposed invention is new, in the sense of the patent law, when it is substantially different from what has gone before it; and this substantial difference, in cases where other analogous or similar things have been previously known or used, is one measure of the sufficiency of invention to support a patent. Our courts have, in truth, without always using

the same terms, applied the same tests of the sufficiency of invention which the English authorities exhibit in determining whether alleged inventions of various kinds possess the necessary element of novelty; that is to say, in determining this question, the character of the result, and not the apparent amount of skill, ingenuity, or thought exercised, has been examined; and if the result has been substantially different from what had been effected before, the invention has been pronounced entitled to a patent."

If all improvements upon existing organisms were patentable, there would be no doubt about sustaining at once the complainant's patent. But sometimes better results are produced by mere mechanical skill, without the exercise of invention. The law does not extend to or cover such cases (Smith v. Nichols, 21 Wall. 118), nor where the change is only in degree, and not new. Guidet v. Brooklin, 105 U. S. 552; McMurray v. Miller, 16 Fed. 471.

The complainant's patent is undoubtedly a great improvement upon everything that went before it. The invention of William Bell (letters patent No. 14,301, granted February 26, 1856) was set up by the defendant as an anticipation, and it certainly contains valuable suggestions. His dumping wagon, however, could not be used for delivering coal in cellar windows, but only for dumping it into pavement vault-holes, where they happened to exist in front of houses, at a proper distance from the edge of the pavement, and it seems to lack adjustability for doing even this successfully.

The evidence shows that Richard Hammell, a respectable citizen of Chambersburg, was formerly engaged in the coal business in Lambertville, New Jersey, and that as early as 1863 he was in the habit of using chutes in delivering coal from a wagon into a cellar. He thinks that he introduced the double or sliding chutes in the fall of 1865, and continued to use them for 10 years. The narrow end of one passed into the wider end of the other. He used the double chutes when the distance for delivery was too far for the single. When the distance was greater than the single chute, they pushed them one into the other to adjust the length. When the distance was still greater, they had chutes that would reach any house. The longest single chute was 16 feet; by combining them they could reach 24 feet, or more, if necessary. When more than one was used, they carried a light trestle to support them in the middle. * * * They had half a dozen such chutes, and when they had occasion put them together.

Peter C. Hoff was also in the coal business in Lambertville, in the spring of 1867, and has continued therein ever since. He used chutes of different lengths, made tapering, and growing smaller to the end, which went into the cellar. The lower end would rest on the cellar window, or the place made to put in the coal. He used more than one at a time, but not frequently. He generally had three chutes,—one about 7 feet long, one about 12, and the other about 14 feet. Then if the place to put the coal in was 10 feet from the line of the street, he would use two chutes, would shove the small end of the one into the larger end of the other, with a trestle under where the connection was, and also a prop by the wagon,—being a seat, board, or something similar,—in order to hold it up to let the coal run into the cellar. He used the 14-feet chute and the 7-feet together in that way, which was about the longest distance he ever used the chute. But in all these cases the coal was shoveled from the wagon into the chutes, which were not attached to the wagon in any way. This testimony exhibits the state of the art when the complainant appeared with his improvement. He has not very largely exercised the inventive faculty in what he has done. His combination is so simple that it seems wonderful that other persons did not think of it. But they did not, and if it has effected any new and useful result the law protects him in its exclusive use. The evidence reveals that by his combination of old instrumentalities a load of coal can be emptied from a cart into a cellar without the agency of a man using a shovel. This is a new result, worthy of the notice of the law, and it is the duty of the court to give to the patentee the benefit of his invention.

A decree must be entered for the complainant, and a reference made for an account.

PHILLIPS et al. v. RISSER et al.

(26 Fed. 308.)

District Court, N. D. Illinois. June 29, 1885.

In equity.

Burnett & Burnett, for complainants. Peirce & Fisher, for defendants.

BLODGETT, J. By this bill complainants charge defendants with the infringement of reissued letters patent No. 4,212, issued to complainant, December 20, 1870, for "an improvement in wagon and car unloading apparatus," the original patent, No. 83,405, having been issued to Noah Swickard, October 13, 1868. The leading feature in the device is the arrangement of two tilting bars with a platform in such manner that the wheels of the wagon or car to be unloaded can be brought to rest on these bars, when, by tilting the bars, the body of the vehicle is tipped to such an angle as to cause the contents to slide or be dumped out by its own gravity. The defenses interposed are: (1) That the patent is void for want of novelty; (2) that the defendants do not infringe; (3) that the reissued patent is for a different invention from that described in the original, and is such an enlargement of the specifications and claims of the original patent as to make the reissue void.

The proof shows a number of devices, prior to that covered by this patent, for unloading cars or trucks by tilting the platform on which they stand so as to cause the contents of the car to slide out or be dumped into a bin or chute; but from the proof I conclude that Swickard was the first to produce a device by which the wagon was tipped or thrown into an inclined position, by means of vibrating bars or rails, which operated in connection with a fixed or stationary platform; and this arrangement seems to be particularly adapted to dumps for unloading bulk grain from wagons drawn by teams, as the team can pass readily upon the fixed platform, the wheels being so guided as to be brought to rest upon the rails or bars forming part of the vibrating platform.

Most, if not all, the prior devices seem to have been specially adapted to unloading the contents of cars or trucks run upon railroad tracks or tram-ways; but it is noticeable that Swickard specially states that his invention is to be used for unloading wagons or cars, although he only shows it in use as arranged for unloading wagons. But it is suggested that if it is applicable to the unloading of cars it must be radically changed; that, while an ordinary farm wagon stands upon wheels at such height that a sufficient inclination can be obtained by dropping the hind end down until the rear axle strikes the fixed platform, the much smaller wheels of a car would cause the axle to strike the fixed platform before the requisite inclination was secured. It is, however, undoubtedly true that the mere suggestion of this patentee that his machine can be used "for unloading wagons or cars" would not invalidate it as a wagon unloader, even if it should require inventive genius to adapt it to the unloading of cars; that is, it may not be used to unload cars, as the word "car" is commonly used, in contradistinction to "wagon," yet it may cover a valid device for unloading a wagon, and would be valid if it is applicable to one use, even if it is not applicable to all the uses suggested by the inventor. The proof, therefore, shows that there is some advantage in using these tilting rails instead of a tilting platform. I am of the opinion that defense of want of novelty is not made out, although I feel compelled to say that in my estimation there is much reason for doubting whether it requires anything more than mere mechanical skill to adapt the older devices to the unloading of wagons. The patent, at least, must be construed to stand upon a very narrow basis.

As before stated, the original patent showed two platforms; that is, a fixed platform, A, and a vibrating or tilting platform, working in slots in the fixed platform, the pivoted balance bars being tied together at their forward end by a cross-board, which rested upon the fixed platform when the movable one was level with the fixed one, so that the vibrating or tilting bars could not move or act independently of each other, but must raise or lower at the same time. The cross-board or plank, C, also acted as a stop to keep the forward ends of the tilting rails from dropping below the fixed platform, while, by the arrangement of the keys, E, E, they held the rear ends of the tilting platform in place until the wagon was drawn onto them, when, by means of a lever, these supporting keys were withdrawn, and by a slight effort, or the weight of the operator, the rear end of the movable platform was dropped to an angle required to slide the load from the wagon. Each of these tilting rails also contains a self-acting dog, G, which was intended to act as a check to prevent the wagon from running back after it had been drawn upon the platform; and, in order to guide the wagon onto the tilting platform, the lid of the hopper was made long enough to reach from inside to inside of the rail, and raised a couple of inches above the platform, so that it would serve to guide the wheels onto the tilting rails. There was also fixed to the forward ends of these tilting bars a bar or hook, which was intended to prevent the front end of the movable platform from rising higher than should be required to secure the necessary slope of the wagon for causing the load to slide out.

The claims of the original patent were: "(1) The slotted platform, A, in combination with the pivoted balance bars, B, B, board,

C, end-bars, I, I, and stops, H, H, all constructed and operating substantially as and for the purposes herein set forth. (2) The pivoted balance bars, B, B, provided with one or more self-acting dogs, G, in combination with the spring toggle keys, E, E, and key, F, all constructed and operating as and for the purposes herein set forth. (3) The arrangement of the slotted platform, A, balance bars, B, B, and lid, D, to the hopper, substantially for the purposes set forth."

It will be seen that the first claim is for the combination of these two platforms, the one fixed and the other capable of the tilting motion described, with the cross-board which tied the forward ends of the tilting rails together, and the hooks or end-bars which limited the height to which the forward end of the tilting platform could rise. The second claim is for the tilting bars, provided with one or more self-acting dogs, in combination with the keys, by which the rear of the tilting platform was held in place while the wagon was being drawn onto it; while the third claim is for the two platforms and lid of the hopper arranged so as to act as a wheel-guide.

The patent as reissued contains seven claims, and the infringement in this case is charged as to the first, fifth, sixth, and seventh claims. These claims, as to which infringement is charged, are as follows: "(1) The tilting platform, B, in combination with platform or floor, A, as and for the purposes set forth. * * * (5) The combination of platforms, A and B, with a stop device, I, for the purpose set forth. (6) The combination of platforms, A and B, with a receiving bin or chute, C, operated substantially as described, for the purpose set forth. (7) The combination of platforms, A and B, with lid, D, for the purposes set forth."

It is conceded that the defendants have constructed grain dumps with tilting rails, each pivoted and working independently of the other, substantially like the defendants' Model A, in evidence in this case, with some variation as to the mode of locking or stopping the rear end of the rails in place, and one dump, like the defendants' Model B, in which, as will be seen, the forward ends of the tilting rails are tied together by a cross-plank; and the first question I propose to consider as to this branch of the case is whether these dumps constructed by the defendants infringe either of these claims of the reissued patent.

The first claim of the reissue is for the tilting platform, B, in combination with the fixed platform or floor, A. In the specifications of the reissue it is said the tilting platform is so constructed "as that its forward end shall rest upon the stationary platform." It must be obvious to any one who studies the operation of these devices that some way must be provided for holding the forward end of the movable platform so that it will not fall below the fixed platform. The specifications of the reissue give no instructions as to how the forward end of the tilting platform is to be constructed, so that it shall rest on the stationary platform; but the drawings show a cross-board which ties the forward ends of the two pivoted bars together, and this cross-board, when these forward ends drop to the level of the fixed platform, must rest on the fixed platform, and thus hold the movable platform level with the fixed platform. This mode of construction is clearly shown in Fig. 2 of the reissue drawing. It may, as I think, be correctly said that this mode of construction shown in the drawings is only one mode, and does not limit the patentee to that mode of construction only; that is, he may, by the reissued patent, use any mode of construction by which the forward end of the movable platform is made to rest on the fixed platform. The rails of defendants' dumps constructed according to Exhibit A rest upon a cross-timber fastened under the stationary platform; while the dump constructed according to Exhibit B shows the forward ends of the rails tied together, so that the cross-board rests on the stationary platform. It seems to me, therefore, that the dumps of the defendant infringe this first claim; that is, they use the fixed and tilting platform acting together substantially as in the reissue, because these two pivoted rails working in their respective slots, when resting upon their front and rear bearings, form a platform, and when a wagon is driven upon them it stands practically upon a platform composed of these two rails and the bearing upon which they rest. When the keys or locks of the rear ends of these rails are removed, then the platform can be tilted, and thereby the wagon put at such an angle as to discharge its load. The tie-bar shown in the defendants' dump, B, and in the drawing, is really inoperative and performs no function, if some other rest for the forward ends of the bar is provided, because these bars working in their slot are all that are needed to hold the four wheels of the wagon, and are practically a platform of themselves, without regard to a tie-board or cross-board connecting their forward end.

The fifth claim is for the combination of the platforms, A and B, with the stop device or hook, by which the platform is prevented from tilting further than is necessary to unload the wagon. The defendants do not use this stop device, and therefore do not infringe this combination.

The sixth claim is for the combination of the platforms, A and B, with the receiving bin or chute. As I shall have something to say about this claim in considering the validity of this reissue, I will only say, in passing, that no special form of receiving bin or chute is shown or described in the specifications. The very idea of dumping or unloading the contents of a wagon or car presupposes that the contents are to be dumped

into some receptacle; and it may well be doubted whether this claim is not too vague and uncertain to be upheld.

The seventh claim is for the combination of the platforms A and B, with the hopper lid, D. This lid, D, as has been said, is arranged to act as a guide to run the wagon wheels upon the rails, and, as defendants use no such device, but have dropped their vibrating rails a slight distance below the surface of the fixed platform, so as to make sure of running the wheels upon the vibrating rails, they do not infringe this combination, their wheel guide being different from that provided in the patent. I therefore conclude that the defendants' dumps infringe the first claim of this reissued patent.

I now come to consider the validity of this reissue. It will be noticed that this reissue was applied for and made more than two years after the issue of the original patent, and the defendants insist that this case is by that fact brought within the cases of James v. Campbell[1] and Miller v. Bridgeport Brass Co.[2] Complainants insist, however that the claims of the reissue are but a restatement of the claims of the original patent. A comparison of the original with the reissued patent shows that the specifications have been much amplified, and, to some extent, new elements are introduced into them. For instance, in the original patent it is said: "A plank or board, C, is secured to the front end of such bars, so that they cannot work independently or separate from each other, but must raise and lower at the same time." In the reissue it is said: "A tilting platform, B, so constructed as that its forward end shall rest upon the stationary platform, while the rear end, consisting of beams or bars, B, shall play within the openings or slots formed in the floor, so that, when required, the rear end of the platform may descend below the line of the floor." Here we have, as it seems to me, a radical departure from the mode of construction indicated by the original patent. The original patent required imperatively that the forward ends of these tilting bars should be fastened together so that they could not work independently or separate from each other, but must raise or lower at the same time. By omitting this element from the reissue, the patentees have caused their device to cover a device which would not be covered by their original patent. Neither the claims of the original patent, nor the specifications, seem to anticipate any other form of construction than one in which the vibrating bars should be fastened together at their forward ends, so that they could not operate independently or separate from each other. By the reissue all that seems to be required is that some rest or stop shall be provided to prevent the forward ends of the vibrating rails from falling below the level of the fixed platform, and, as I have already said, the defendants so construct their dump that the forward ends of the vibrating rails rest upon a timber fastened to the under side of the fixed platform. Here is a new invention or different invention described and claimed from that described and claimed in the original patent. The original patent claimed a vibrating platform of a peculiar construction, with certain elements in it. The reissue claims a different vibrating platform, with less elements in it, and describes a vibrating platform not covered by the original specifications or claims.

As, in considering the question of infringement, I have held that the defendants only infringe the first claim of the reissue, it may not be necessary to consider the validity of the fifth, sixth, and seventh claims of this reissue; but I can hardly forbear the passing remark that the sixth claim of the reissue, which is for the combination of the two platforms with the receiving bin or chute, seems to me to be a most unwarrantable enlargement and expansion of the original patent. The original patent contained no suggestion or description of a receiving bin or chute. The only possible allusion to it is the mention of the lid to the hopper; and yet, by the sixth claim of this reissue, an element which is not in the original patent, either by description or claim, is made one of the elements of a combination. It therefore seems to me that this reissued patent must be held void, as being for an invention not described in or covered by the original patent. This patentee could not, by this reissue, add new features or omit old features, especially after the lapse of so much time from the issue of the original patent.

The proof in the case shows quite conclusively that, at or about the time of the issue of this original patent, this kind of dumps or devices for unloading wagons came into use, especially at elevators and corn-shelling warehouses at railroad stations, and it was found by practical experience that two pivoted rails so arranged that the wagon could be driven upon them, with proper stops to hold them in place, and a device for the releasing of the stop when ready to dump, was all that was necessary for the purpose, and Sypes, McGrath, and other inventors entered the field with this simpler form of dump, whereupon plaintiff sought and obtained this reissue in order to cover this less complicated construction which others had introduced and proved useful.

This bill is dismissed for want of equity.

[1] Fed. Cas. No. 2,361.
[2] Fed. Cas. No. 9,563.

BARTLETTE v. CRITTENDEN et al.

(Fed. Cas. No. 1,082, 4 McLean, 300.)

Circuit Court, D. Ohio. July Term, 1847.

[In equity. Bill by R. M. Bartlette to restrain A. F. Crittenden and others from infringement of copyright. Injunction granted.]

Mr. Walker, for complainant. Storer & Gwynn, for defendants.

OPINION OF THE COURT. This is an application to enjoin the defendants from printing, publishing, or selling a work denominated "An inductive and practical system of double-entry book-keeping, on an entirely new plan," on the ground that a material part of the manuscript, and the arrangement, were the work of the complainant, and were pirated from him by the defendants. It appears that the complainant for twelve years has been engaged in teaching the art of book-keeping, in the city of Cincinnati and other places. That he had reduced to writing the system he taught, on separate cards for the convenience of imparting instruction to his pupils; and that he permitted his students to copy these cards, with the view to their own advantage and to enable them to instruct others. That Jonathan Jones, being qualified in the school of the complainant, as a teacher, and having copied the manuscripts of the complainant, engaged, in connection with him, to teach a commercial school in St. Louis. While thus engaged, A. F. Crittenden, one of the defendants, entered the school at St. Louis as a student, and was permitted to copy the manuscripts of the complainant, in the possession of Jones; and from those manuscripts, with certain alterations, he made up the first ninety-two pages of the book, under the above title, which was published in Philadelphia, in connection with his brother, by E. C. & J. Biddle, two of the defendants, in the present year. The answers of the defendants either deny the allegations of the bill, or do not admit them, and call for proof of the facts stated. On this motion for an injunction the merits of the case have been discussed, with much research and ability.

This application is made under the 9th section of the act of congress of the 3d of February, 1831, [4 Stat. 438,] which provides, that "any person or persons who shall print or publish any manuscript whatever, without the consent of the author or legal proprietor first obtained, etc., shall be liable to suffer and pay to the author or proprietor, all damages occasioned by such injury," etc. And power is given to grant an injunction to restrain the publication. The first section of the act of the 30th of June, 1834, [4 Stat. p. 728, c. 157,] requires all deeds or instruments in writing for the transfer or assignment of copy-rights, to be acknowledged and recorded. At common law, independently of the statute, I have no doubt, the author of a manuscript might obtain redress against one who had surreptitiously got possession of it. And on general equitable principles, I see no objection to relief being also given, under like circumstances, by a court of chancery. But this is a proceeding under the statute.

The defendants contend that the complainant, by suffering copies of his manuscripts to be taken, abandoned them to the public. The principle is the same, it is alleged, in regard to copy-rights and patents. And that a consent or permission of the author to use the manuscripts, is as fatal to his exclusive right, as the consent of the inventor to use the thing invented. Rundell v. Murray, [Saunders v. Smith,] 3 Mylne & C. 711, 728, 730, 735; Millar v. Taylor, 4 Burrows, 186, [2303;] Barfield v. Nicholson, 2 Sim. & S. 1. To show the analogy between copy-right and patents, the defendants cited Whittemore v. Cutter, [Case No. 17,601;] Mellus v. Sillsbee, [Id. 9,404.] in which the question considered was, did the inventor suffer the thing patented to go into public use without objection? Walcot v. Walker, 7 Ves. 1; Platt v. Button, 19 Ves. 448; Wyeth v. Stone, 1 Story, 273, Fed. Cas. No. 18,107.

The 7th section of the act of the 3d of March, 1839, [5 Stat. 354,] declares that a purchaser from the inventor of the thing invented, before a patent is obtained, shall continue to enjoy the same right after the obtainment of the patent as before it; and that such sale shall not invalidate the patent, unless there has been an abandonment, or the purchase has been made more than two years before the application for the patent. Before this act, a sale of the right would have been an abandonment to the public by the inventor. The decisions, therefore, referred to, do not apply to cases arising under this statute. A sale of the right is not an abandonment, if made within two years before the application for a patent, as the law now stands; and it may be a matter of some difficulty, within the above limitation of two years, to determine what act shall amount to an abandonment. Where the act is accompanied by a declaration, to that effect, there can be no doubt; but if a sale be not an abandonment, a mere acquiescence in the use of the invention would seem not to be. Within the two years, to constitute an abandonment, the intention to do so must be expressed or necessarily implied from the facts and circumstances of the case. It is a question of intention, as to the extent of the license, of which we must judge, as we are called to do in other cases. But the limitation of two years does not apply in this case, should a copy-right be considered in principle identical with an invention of a machine, as more than two years have elapsed since copies of the complainant's manuscripts were taken with his consent.

The question arises upon the facts stated, and must be decided on general principles. In the first place, there was no consent of

the complainant, that his manuscripts should be printed. That they were not prepared for the press is admitted. They were without index or preface, although, as alleged, they may have contained the substantial parts of the complainant's system, which, in due time, he intended to print. Copies of the manuscripts were taken for the benefit of his pupils, and to enable them to teach others. This, from the facts and circumstances of the case, seems to have been the extent of the complainant's consent. It is contended that this is an abandonment to the public, and is as much a publication as printing the manuscripts. That printing is only one mode of publication, which may be done as well by multiplying manuscript copies. This is not denied, but the inquiry is, does such a publication constitute an abandonment? The complainant is no doubt bound by this consent, and no court can afford him any aid in modifying or withdrawing it. The students of Bartlette, who made these copies, have a right to them and to their use as originally intended. But they have no right to a use which was not in the contemplation of the complainant and of themselves, when the consent was first given. Nor can they, by suffering others to copy the manuscripts, give a greater license than was vested in themselves. In England, if an invention be pirated and given to the public, it prevents an inventor from obtaining a patent. But this is not the construction of our laws. If an inventor of a machine sell it or acquiesce in its public use, not within the limitation of the two years, he forfeits his rights. He must be diligent in making known and asserting his right, where it has surreptitiously got into the possession of another, or he abandons it. This was the settled rule before the act of 1839, and it would seem that cases which do not come within the provisions of that act, must be governed by the old rule. No length of time, where the invention does not go into public use, can invalidate the right of the inventor. He may take his own time to perfect his discovery, and apply for a patent. And the same principle applies to the manuscripts of an author. If he permit copies to be taken for the gratification of his friends, he does not authorize those friends to print them for general use. This is the author's right, from which arises the high motive of pecuniary profit and literary reputation. When the inventor consents to the construction and use of his machine, he yields the whole value of his invention. But an author's manuscripts are very different from a machine. As manuscripts, in modern times, they are not and can not be of general use. Popular lectures may be taken down verbatim, and the person taking them down has a right to their use. He may in this way perpetuate the instruction he receives, but he may not print them. The lecturer designed to instruct his hearers, and not the public at large. Any use, therefore, of the lectures, which should operate injuriously to the lecturer, would be a fraud upon him for which the law would give him redress. He can not claim a vested right in the ideas he communicates, but the words and sentences in which they are clothed belong to him.

It is contended that the manuscripts are incomplete, and if published in their present state, could not be protected by a copy-right. That an unfinished manuscript or book, which gives only a part of the thing intended to be written or published, can be of no value, and if printed no relief could be given, as no damage would be done. That the parts of a machine, in the process of construction, if pirated, would give no right to an injunction by the inventor. If the manuscript or machine referred to consisted of a mere fragment, which embodied no principle and pointed to no design, the piracy of it would afford no ground of relief. But such is not the character of complainant's manuscripts. They may not be complete for publication. Some explanatory notes may be wanting, to assist the reader in comprehending the system. This information was communicated by lectures, and for the purposes of instruction in that mode, the notes were unnecessary. But the cards contain the frame work of the system. The substratum is there, and so exemplified as to show the principle upon which it is constructed. That it was valuable, is shown, from the fact of the cards having been used by the defendants in teaching the system, and in publishing them as they have done.

The facts show the piracy beyond all doubt, and that it was done under circumstances which admit of little or no mitigation. The cards, as they well knew, had been, for a number of years, and were then being used by the complainant to instruct pupils. They had learned all they knew on the subject from the complainant. They probably knew that he intended to publish his plan. But this would, to some extent, at least, supersede the necessity of personal instruction. In disregard of these considerations, and of the obligations the defendants owed to the complainant, the publication was made.

The court will allow an injunction unless a satisfactory arrangement shall be made between the parties.

CELLULOID MANUF'G CO. v. CELLONITE MANUF'G CO.

(32 Fed. 94.)

Circuit Court, D. New Jersey. July 12, 1887.

Motion for preliminary injunction.

Rowland Cox, for the motion. John R. Bennett, contra.

BRADLEY, J. The bill of complaint in this case states that the complainant was incorporated under the laws of New York in 1871, and has ever since that time used its corporate name in carrying on its business of the manufacture and sale of various compounds of pyroxyline, adapted to different uses and purposes, and that its name has become of great consequence in the good-will of its business, its standing, and the reputation of its goods; that, in order to designate its said manufactured product, and to distinguish it from similar compounds manufactured by others, the complainant, from the first, adopted and used the word "celluloid," which had never been used before, except to a limited extent by Isaiah S. and John W. Hyatt, by whom the word was coined, and who were engaged in the same manufacture at Albany, New York, and used the word as a trade-mark; and when complainant was incorporated the said Hyatts entered into its employ, and assigned to it all their rights relating to the business, good-will, and trade-mark; and complainant has ever since used the word "celluloid" as its trade-mark, by impressing or stamping it into the surface of the articles made from the manufactured product, whereby it has acquired a high reputation as denoting complainant's manufacture, and indicating goods of superior quality, as compared with like goods sold by other parties under the names of chrolithion, lignoid, pasbosene, etc.; that in 1873 complainant caused said word "celluloid" to be registered as a trade-mark in the United States patent-office, under the act in such case made and provided, and again registered in 1883, under the subsequent act. The bill then complains that the defendant, in order to deprive the complainant of its business and its rights, and to create an unfair competition, since the first day of January, 1886, has adopted the name of Cellonite Manufacturing Company, with intent that it should be mistaken for complainant's name, and intends to use it in the transaction of business similar to that of the complainant; that the similarity of names will embarrass and obstruct the business of the complainants, cause confusion and mistake, divert complainant's custom, reduce its sales, and deceive the public; that the defendant has commenced to erect works on an extensive scale for the manufacture of a compound of pyroxyline, to be put on sale under the name of "cellonite," a name purely arbitrary, and adopted to enable the defendant to sell the article as complainant's produce; that the corporators who formed the defendant company had previously been engaged in the manufacture of pyroxyline compounds under the name of "pasbosene," "lignoid," "chrolithion," etc., but selected the new name, "cellonite," in order to trade upon the complainant's reputation, and to sell its product as the complainant's, and intends to stamp its goods with the word "cellonite," in imitation of the stamp on complainant's goods, in order to sell them as complainant's manufacture. The bill prays an injunction to prevent the defendant from using the word "cellonite," or any imitation of the word "celluloid." The allegations of the bill are verified by affidavits and exhibits.

The defendant has filed an answer, in which it denies that the complainant has any right to the exclusive use of the word "celluloid;" alleges that many companies use it in their names, as "Celluloid Brush Company," "Celluloid Collar & Cuff Company," etc., which have been allowed by complainant without objection. It admits the selection and use of the word by the complainant, but denies any exclusive right to the use of it, because it has become a part of the English language to designate the substance celluloid, and the impression of the word on the articles manufactured by complainant merely indicates the substance of which they are composed. It denies that the word "cellonite" was adopted for the purpose of imitating the name of complainant, or the name stamped on the complainant's goods. It avers that the word was adopted as far back as 1883, and has been continuously used ever since, not to imitate the word "celluloid," but selected as better describing the exact nature of the pyroxyline compound used by the defendant; the same being a compound of the well-known substances cellulose and nitre, "cellonite" being merely a compound derivative of those two words; that the defendant abandoned the use of the words "pasbosene," "lignoid," etc., because those words gave no information as to the chemical constituents of the compounds designated by them. It alleges that it has for four years been engaged in manufacturing and selling goods marked "Cellonite," and until now no attempt has been made to interfere with it. To show that the word "celluloid" is a word of common use, the answer cites various patents and books, (but all subsequent to 1873,) also the rules of the patent-office as to the classes of inventions, in which one of the sub-classes is "Celluloid."

The only verification of the answer is the oath of J. R. France, an officer of the company, who swears that the contents are true, so far as they are within his knowledge; and, so far as stated on information and belief, he believes them to be true.

The answer virtually admits that the cor-

porators of the defendant had been engaged, before the formation of the defendant company, in the same manufacture, and had called their produce, "pasbosene," "lignoid," etc.; and that they adopted the word "cellonite," instead of those designated, for the reason, as the answer says, that it is more expressive of the constituents, cellulose and nitre. This is a somewhat singular explanation. The termination "ite," in chemistry, has a technical application nothing to do with the word "nitre;" and, notwithstanding the denial of the answer, (which, however, cannot be regarded as verified by oath,) the inference strongly presses itself that the name was adopted on account of its similarity to "celluloid," as the complainant charges.

In alleging that the word "cellonite" has been used by the defendant since 1883, the defendant, which was not incorporated until May, 1886, identifies itself with the previous association, shown by the affidavits to have been called the "Merchants' Manufacturing Company," composed of the same corporators, who abandoned the old name, and assumed the new one, for some purpose or other. The explanation given for so doing is not entirely satisfactory. Here are two facts standing side by side: First, the fact that the Celluloid Manufacturing Company,—an old, well-established concern,—is doing a large and prosperous business, with a good-will resulting from many years of successful effort, and calls the product of its manufacture "celluloid," which has become such a popular designation that, as the defendant says, it has become incorporated in the English language; secondly, the fact that the Merchants' Manufacturing Company, which produces substantially the same article, and calls it by different names, "pasbosene," "lignoid," etc., (with what success we are not told,) suddenly changes its name to that of Cellonite Manufacturing Company, and calls its produce "cellonite." It will take a great deal of explanation to convince any man of ordinary business experience that this change of name was not adopted for the purpose of imitating that of the old, successful company.

It is the object of the law relating to trade-marks to prevent one man from unfairly stealing away another's business and good-will. Fair competition in business is legitimate, and promotes the public good; but an unfair appropriation of another's business, by using his name or trade-mark, or an imitation thereof calculated to deceive the public, or in any other way, is justly punishable by damages, and will be enjoined by a court of equity. The question before me is whether the law has been violated in the present case.

First. As to the imitation of the complainant's name. The fact that both are corporate names is of no consequence in this connection. They are the business names by which the parties are known, and are to be dealt with precisely as if they were the names of private firms or partnerships. The defendant's name was of its own choosing, and, if an unlawful imitation of the complainant's, is subject to the same rules of law as if it were the name of an unincorporated firm or company. It is not identical with the complainant's name. That would be too gross an invasion of the complainant's right. Similarity, not identity, is the usual recourse when one party seeks to benefit himself by the good name of another. What similarity is sufficient to effect the object has to be determined in each case by its own circumstances. We may say, generally, that a similarity which would be likely to deceive or mislead an ordinary unsuspecting customer is obnoxious to the law. Judged by this standard, it seems to me that, considering the nature and circumstances of this case, the name "Cellonite Manufacturing Company" is sufficiently similar to that of the "Celluloid Manufacturing Company" to amount to an infringement of the complainant's trade name. The distinguishing words in both names are rather unusual ones, but supposed to have the same sense. Their general similarity, added to the identity of the other parts of the names, makes a whole which is calculated to mislead.

Secondly. As to the complainant's alleged right to the exclusive use of the word "celluloid" as a trade-mark, and the defendant's alleged imitation thereof. On this branch of the case, the defendant strenuously contends that the word "celluloid" is a word of common use as an appellative, to designate the substance celluloid, and cannot, therefore, be a trade-mark; and, secondly, if it is a trade-mark the defendant does not infringe it by the use of the word "cellonite."

As to the first point, it is undoubtedly true, as a general rule, that a word merely descriptive of the article to which it is applied cannot be used as a trade-mark. Everybody has a right to use the common appellatives of the language, and to apply them to the things denoted by them. A dealer in flour cannot adopt the word "flour" as his trade-mark, and prevent others from applying it to their packages of flour. I am satisfied from the evidence adduced before me that the word "celluloid" has become the most commonly used name of the substance which both parties manufacture, and, if the rule referred to were of universal application, the position of the defendant would be unassailable. But the special case before me is this: The complainant's assignors, the Hyatts, coined and adopted the word when it was unknown, and made it their trade-mark, and the complainant is assignee of all the rights of the Hyatts. When the word was coined and adopted, it was clearly a good trade-mark. The question is whether the subsequent use of it by the public, as a common appellative of

the substance manufactured, can take away the complainant's right. It seems to me that it cannot.

As a common appellative, the public has a right to use the word for all purposes of designating the article or product, except one,—it cannot use it as a trade-mark, or in the way that a trade-mark is used, by applying it to and stamping it upon the articles. The complainant alone can do this, and any other person doing it will infringe the complainant's right. Perhaps the defendant would have a right to advertise that it manufactures celluloid. But this use of the word is very different from using it as a trade-mark stamped upon its goods. It is the latter use which the complainant claims to have an exclusive right in; and, if it has such right, (which it seems to me it has,) then such a use by the defendant of the word "celluloid" itself, or of any colorable imitation of it, would be an invasion of the complainant's right. As a trade-mark it indicates that the article bearing it is the product of the complainant's manufacture. If another party uses it in that way, it indicates a falsehood, and is a fraud on the public, and an injury to the complainant. The essence of the law of trade-marks is that one man has no right to palm off, as the goods or manufacture of another, those that are not his. This is done by using that other's trade-mark, or adopting any other means or device to create the impression that goods exhibited for sale are the product of that other person's manufacture when they are not so.

The subject is well illustrated by the case of McAndrew v. Bassett, 4 De Gex, J. & S. 380. The plaintiffs produced a new article of liquorice, and stamped the sticks with the word "Anatolia," some of the juice from which they were made being brought from Anatolia, in Turkey. The article becoming very popular, the defendants stamped their liquorice sticks with the same word. Being sued for violation of plaintiffs' trade-mark, one of their defenses was that no person has a right to adopt as a trade-mark a common word, like the name of a country where the article is produced. Lord Chancellor Westbury said: "That argument is merely the repetition of the fallacy which I have frequently had occasion to expose. Property in the word, for all purposes, cannot exist; but property in that word, as applied by way of stamp upon a particular vendible, as a stick of liquorice, does exist the moment the article goes into the market so stamped, and there obtains acceptance and reputation, whereby the stamp gets currency as an indication of superior quality, or of some other circumstance which renders the article so stamped acceptable to the public." Page 386.

Another case throwing light on the subject is that of Singer Machine Manuf'g Co. v. Wilson, 3 App. Cas. 376. There the defendant, a manufacturer and vendor of sewing-machines, inserted in his price-list, among other articles for sale, the "Singer Sewing-Machine," and sold machines by that name, but having his own trade-mark upon them. The plaintiff sued him on the ground that by a Singer sewing-machine was understood in the community a sewing-machine made by Singer, the inventor, or by the plaintiff, his assignee and successor in business. The plaintiff contended, therefore, that the advertisement was a fraud on the public, and an invasion of its exclusive right to the name "Singer." The defendant contended that the terms "Singer Sewing-Machine" meant a particular kind of machine, (which he described,) irrespective of who manufactured it; that the word "Singer" had come to be descriptive in its character, and would not have the effect attributed to it by the plaintiff. The judges who delivered opinions in the case, held that if the use of the name "Singer" gave the public to understand that the defendant sold machines made by the plaintiff, it was a wrong done to the plaintiff; but that if the name had come into common use as a name of a particular kind of machine, irrespective of the maker, the defendant had a right to use it in his advertisements in that sense, using his own trade-mark on the article itself; and it was held by all the judges that it was a matter to be determined by evidence whether the use of the name in the advertisement had the one effect or the other.

This, it will be observed, was a case of advertising, and not of imitating a trade-mark. Still, if it had the same effect, it was held to be equally culpable. The case does not decide that, if the word "Singer" had been the plaintiff's trade-mark, any change in its use would have affected such trade-mark, but does decide that an extension of its use might render the word harmless in an advertisement.

The defendant's counsel in the present case placed great reliance on the decision in Cloth Co. v. Cloth Co., 11 H. L. Cas. 523. After carefully reading that case, I do not see that it necessarily governs the present. No question was made as to the names of the companies. The trade-mark there was a large circular label stamped upon the cloth, containing, within its circumference, the name of the former company which carried on the manufacture, and the places where it had been carried on, thus: "Crockett International Leather Cloth Company, Newark, N. J., U. S. A.; West Ham, Essex, England." Within the circle were, first, the figure of an eagle, displayed, under the word "Excelsior," and then certain announcements in large type, as follows: "Crockett & Co. Tanned Leather Cloth: patented Jan'y 24, '58. J. R. & C. P. Crockett, Manufacturers." The court held this label to be partly trade-mark and

partly advertisement; and, as the cloth was not patented, and J. R. & C. P. Crockett were not the manufacturers, the court was inclined to agree with the lord chancellor that these statements invalidated the label as a trade-mark; but Lords Cranworth and Kingsdown preferred to place their decision against the plaintiff on the ground that the defendants' label did not infringe it. They pointed out differences in figure, and showed that the announcements were different; and the defendants' announcement being "Leather cloth, manufactured by their manager, late with J. R. & C. P. Crockett & Co.," without any reference to a patent, Lord Kingsdown said: "The leather cloth, of which the manufacture was first invented or introduced into the country by the Crocketts, was not the subject of any patent. The defendants had the right to manufacture the same article, and to represent it as the same with the article manufactured by the Crocketts; and, if the article had acquired in the market the name of Crocketts' leather cloth, not as expressing the maker of the particular specimen, but as describing the nature of the article by whomsoever made, they had a right in that sense to manufacture Crocketts' leather cloth, and to sell it by that name. On the other hand, they had no right, directly or indirectly, to represent that the article which they sold was manufactured by the Crocketts or by any person to whom the Crocketts had assigned their business or their rights. They had no right to do this, either by positive statement, or by adopting the trade-mark of Crockett & Co., or of the plaintiffs to whom the Crocketts had assigned it, or by using a trade-mark so nearly resembling that of the plaintiff as to be calculated to mislead incautious purchasers."

It seems to me that the true doctrine could not be more happily expressed than is here done by Lord Kingsdown. There is nothing in the case, nor in the opinions of any of the judges, adverse to the claim of the complainant.

There is a case in the New York Reports (Selchow v. Baker, 93 N. Y. 59) which comes very near to that now under consideration. That was the case of "sliced animals," and other "sliced" objects, being a term used by the plaintiff as a trade-mark to designate certain puzzles manufactured and sold by them, in which pictures of animals, etc., on cardboard, were sliced up in pieces, and the puzzle was to put the pieces together and make the animal. The label "Sliced Animals," etc., was used by the plaintiffs on all boxes of these goods sold by them. The defendants infringed, and the question was whether this kind of designation could avail as a trade-mark. Judge Rapallo, in delivering the opinion of the court, after reviewing many cases on the subject, concludes as follows: "Our conclusion is that where a manufacturer has invented a new name, consisting either of a new word or a word or words in common use, which he has applied for the first time to his own manufacture, or to an article manufactured by him, to distinguish it from those manufactured and sold by others, and the name thus adopted is not generic or descriptive of the article, its qualities, ingredients, or characteristics, but is arbitrary or fanciful, and is not used merely to denote grade or quality, he is entitled to be protected in the use of that name, notwithstanding that it has become so generally known that it has been adopted by the public as the ordinary appellation of the article."

This case is so directly in point that it seems unnecessary to look further. I think it perfectly clear, as matter of law, that the complainant is entitled to the exclusive use of the word "celluloid" as a trade-mark.

The only question remaining to be considered, therefore, is whether the defendant, by the use of the word "cellonite," as a trade-mark, or impression upon its goods as a trade-mark, does or will infringe the trade-mark of the complainant. Is the word "cellonite" sufficiently like the word "celluloid," when stamped upon the manufactured articles, to deceive incautious purchasers, and to lead them to suppose that they are purchasing the products of the same manufacturers as when they purchased articles marked "celluloid?" I think this question must be answered in the affirmative. I think that, under the circumstances of the case, the word "cellonite" is sufficiently like the word "celluloid" to produce the mischief which is within the province of the law. I say, under the circumstances of the case. By that I mean the previous nomenclature applied to the articles as manufactured by different persons. The complainant has always stamped its goods with the word "celluloid." Other manufacturers have called the product as manufactured by them by names quite unlike this, as "pasbosene," "lignoid," "chrolithion," etc.; so that a wide difference in designation and marking has existed between the complainant's goods and those of all others. The adoption now of a word and mark so nearly like the complainant's as "cellonite" cannot fail, it seems to me, to mislead ordinary purchasers, and to deceive the public.

The defendant, however, sets up two grounds of defense against the application for an injunction outside of the merits of the case: First, that the complainant has acquiesced in the use of the word "celluloid" in the names of a great number of other companies, several of which are enumerated in the answer, such as the "Celluloid Brush Company," the "Celluloid Collar & Cuff Company," and the like; and, by such acquiescence, has lost any right to complain of such use by other companies. But it is obvious that such special names, indicating confinement to a particular branch of the trade, are wholly unlike the complainant's general

name of "Celluloid Manufacturing Company." Besides this, it is altogether probable, as we gather from one of the affidavits, that these branch companies are mostly licensees of the complainant, and very properly use the word "celluloid" in their names. We think that this defense cannot justly prevail.

The other is of somewhat the same character,—supposed laches and acquiescence on the part of the complainant, in allowing the defendants themselves, for three or four years prior to the suit, to use the word "cellonite," stamped on their articles of manufacture, and in their business name. How the defendant could have done this before its own existence is difficult to understand. But, suppose it is meant that it was done by the corporators and predecessors of the defendant, there is no proof that it ever came to the knowledge of the complainant; and the fact that the previous name used under the former corporate organization was that of the "Merchants' Manufacturing Company" is sufficient to afford the complainant prima facie ground of excuse for not having learned of the alleged use of the word "cellonite," if it ever was used. I do not think that either of these defenses can avail the defendant. My conclusion is that the complainant, as the case now stands, is, in strictness, entitled to an injunction to restrain the defendant from using the name "Cellonite Manufacturing Company," or any other name substantially like that of the complainant; and from using the word "cellonite" as a trade-mark or otherwise, upon the goods which it may manufacture or sell, or any other word substantially similar to the word "celluloid," the trade-mark of the complainant.

But my great reluctance to grant a preliminary injunction for suppressing the use of a business name, or of a trade-mark, in any case in which the matter in issue is a subject for fair discussion, and admits of some doubt in the consideration of its facts, induces me to withhold the order for the present, on condition that the defendant will agree to be ready to submit the cause for final hearing at the next stated term of the court, which commences on the fourth Tuesday of September. It is possible that additional evidence, or a fuller verification of the allegations of the answer, may so modify the facts of the case presented for consideration as to lead to a change of views on the question of infringement, or of excuse therefor. At all events, it will be more satisfactory not to render judgment in the case until the defendant has been fully heard, and when it would have a right of immediate appeal. Should the defendant not be ready for a hearing at the time indicated, the present motion may be renewed without additional argument, or the complainant may take such other course as it shall be advised.

At the September term no further evidence was offered, and an order for injunction was granted without opposition.

CROOK v. FIRST NAT. BANK OF BARABOO.

(52 N. W. 1131, 83 Wis. 31.)

Supreme Court of Wisconsin. Sept. 27, 1892.

Appeal from circuit court, Sauk county; Robert G. Siebecker, Judge.

Action by Peter Crook, as administrator of the estate of Lucretia Austin, deceased, against the First National Bank of Baraboo. From an order overruling a demurrer to the answer, plaintiff appeals. Affirmed.

The other facts fully appear in the following statement by PINNEY, J.:

The appellant, in his capacity as administrator of the estate of Lucretia Austin, deceased, brought this suit against the respondent, alleging that prior to and at the time of her death there was deposited in the defendant bank, of the moneys of the said Lucretia Austin, and to her credit, the sum of $4,504.70, which sum it was alleged was due and owing to her, the said Lucretia Austin, from the defendant bank, at the time of her death, but the defendant still has and holds it, and on demand of plaintiff has refused to pay the same. The answer alleges, in substance, as a first defense, that prior to the death of the said Lucretia Austin, and on the 28th of December, 1887, the defendant received from her four United States government bonds, with directions to sell them, and place the proceeds to her credit; and also received therewith, at the same time, for collection, certain interest coupons of the value of $221, the proceeds of which were in like manner to be placed to her credit. That such proceeds of the bonds and coupons were $4,504.70, and were, immediately after the sale of said bonds and collection of said coupons, placed to her credit in the said bank; that they were receipted for by the cashier of said bank when it received them, as follows: "Ironton, Dec. 28, '87. Received of Lucretia Austin four 4½ registered bonds, No. 43,981, No. 43,986, No. 43,983, No. 43,982, to be sold, and the proceeds placed to her credit in the 1st Nat'l Bank of Baraboo. Also for collection, $221 in coupons. Chas. L. Sproat, Cashier." Lucretia Austin died January 3, 1888, and afterwards, on the 6th of February, 1888, the said receipt was presented at the defendant bank by Charles Mitchell, indorsed upon the back thereof as follows: "Ironton, Sauk Co., Wis. Mr. Chas. L. Sproat, Baraboo, Wis.—Sir: Please let Chas. Mitchell, my nephew, have the amount of the within bill, and oblige, Lucretia Austin. Witness: W. H. Mitchell, Catherine Dyson."—dated January 2, 1888. That the said Sproat, as cashier of the bank, upon the presentation of the receipt so indorsed, paid to the said Mitchell the amount aforesaid, namely, $4,504.70. The defendant alleged that by the delivery of the said receipt with the order of direction so made thereon the said Lucretia Austin, on the 2d of January, 1888, "intended to give, and did give," the amount for which the said receipt was given, to wit, the sum of $4,504.70, to the said Charles Mitchell, or to the said Charles Mitchell and others, to wit, to said Charles Mitchell and his brothers and sisters. The second defense was that the plaintiff, as such administrator of the estate of Lucretia Austin, after the payment of the said sum of money to Charles Mitchell, as aforesaid, upon the said receipt bearing the indorsement and order above mentioned, commenced an action in the circuit court for Sauk county against said Mitchell and others, and recovered judgment for the amount so paid by the defendant in this action to the said Charles Mitchell on the 6th of February, 1888, to wit, $4,504.70, together with interest thereon; that said judgment was for the same demand and claim made in this action against the defendant; and it is averred that the plaintiff, by instituting the action against Mitchell and others, and prosecuting the same and recovering judgment therein for said money collected on said bonds and coupons, and paid by the defendant to the said Charles Mitchell, as aforesaid, on presentation of said receipt and indorsement, elected to hold, and did hold, the said Charles Mitchell and his codefendants liable thereon, and thereby waived the right to claim the same of the defendant. The plaintiff demurred to the answer. The circuit court overruled the demurrer, and from the order thereon plaintiff appealed.

G. Stevens and Duffy & McCrory, for appellant. R. D. Evans, for respondent.

PINNEY, J. (after stating the facts). The receipt set out in evidence given by the bank to Lucretia Austin for the four bonds and $221 in coupons, the former to be sold and the latter to be collected, and the proceeds to be placed to her credit, was more than a mere receipt. It was of a contractual character, defining the duty of the bank in the premises, and was the sole evidence which Mrs. Austin had to establish her right to the fund produced by the sale of the bonds and collection of the coupons. The bank, upon such sale and collection, became her debtor for the amount. The receipt was in the nature of a certificate of deposit. Plainly, the bank would not be expected to or be bound to pay over the money without the surrender of its obligation to Mrs. Austin. The receipt was, therefore, potentially the fund itself, without which, in the ordinary course of business, it could not be obtained; and equitably, at least, if not legally, it possessed all the characteristics of a regular certificate of deposit. It represented the money, the proceeds of the bonds and coupons. The answer alleges, in substance, the delivery of this receipt with the indorsement thereon by Mrs. Austin to her nephew, Charles Mitchell, five days after its date, and one day before her death, and that she thereby "intended to give, and did give," the entire fund produced from the bonds and coupons—$4,504.70—to the

said Charles Mitchell, or to him and his brothers and sisters. Construed with reasonable liberality, the answer must be held to allege a gift of this fund due from the bank to Mrs. Austin, under the circumstances above stated, to the party named in the order, and evidence would doubtless be admissible under the answer to show a gift of the fund either inter vivos or causa mortis. A gift inter vivos must be completed by a delivery of the subject of the gift. A donatio causa mortis must be completely executed, so far as delivery is concerned, in the lifetime of the donor, precisely as required in the case of gifts inter vivos. A donatio causa mortis is a gift absolute in form, made by the donor in anticipation of his speedy death, and intended to take effect and operate as a transfer of title only upon the happening of the donor's death. The gift must be absolute, with the exception of the conditions inherent in its nature, and a delivery of the article donated is a necessary element; but it may be revoked by the donor, and is completely revoked by his recovery from the sickness or escape from the danger in view of which it was made. And, if not so revoked, the gift may be taken by the administrator of the donor, if necessary, for the payment of his debts. 3 Pom. Eq. Jur. § 1146; Basket v. Hassell, 107 U. S. 609, 610, 2 Sup. Ct. 415; Henschel v. Maurer, 69 Wis. 576, 34 N. W. 926. The question presented by the first defense is whether the delivery of the receipt, indorsed, as stated, to Charles Mitchell, with intent to give him the proceeds of bonds and coupons, could operate as a gift, for whether the gift was one inter vivos or was intended as a donatio causa mortis is not a material question, as it is abundantly shown by the authorities that, so far as the subjects which may be disposed of by gift and the question of delivery are concerned, the law is the same in either case. Camp's Appeal, 36 Conn. 92, 93; Harris v. Clark, 3 N. Y. 93, 113; Grover v. Grover, 24 Pick. 261, 264; Basket v. Hassell, 107 U. S. 614, 2 Sup. Ct. 415. The law favors free and comprehensive power of disposition by an owner of his property, and the rigor of the earlier cases has been materially relaxed, both as to the subjects of such gifts and as to what will serve as a delivery to make them effectual. This is well illustrated by the cases above cited, in which it is held that the thing given must be delivered, or it must be placed in the power of the donee by delivery to him of the means of obtaining possession. "As to the character of the thing given," says Shaw, C. J., in Chase v. Redding, 13 Gray, 418, 420, "the law has undergone some changes. Originally it was limited, with some exactness, to chattels, to some object of value deliverable by the hand; then extended to securities transferable solely by delivery, as bank notes, lottery tickets, notes payable to bearer or to order and indorsed in blank; subsequently it has been extended to bonds and other choses in action in writing represented by a certificate, when the entire equitable interest is assigned; and in the very latest cases on the subject in this commonwealth it has been held that a note not negotiable, or, if negotiable, not indorsed, but delivered, passes with a right to use the name of the administrator of the promisee to collect for the donee's own use." And in Parish v. Stone, 14 Pick. 198, speaking of the extension of the doctrine to include choses in action delivered so as to operate only as a transfer by equitable assignment or a declaration of trust, Shaw, C. J., also says that "these cases all go on the assumption that a bond or other security is a valid, subsisting obligation for the payment of a sum of money, and the gift is in effect a gift of the money by a gift and delivery of the instrument that shows its existence and affords the means of reducing it to possession." It has since been repeatedly held "that a deposit in a savings bank may be the subject of a valid donatio causa mortis, as well as of a gift inter vivos, and that such a gift may be proved by the delivery of the bank book to the donee, or a third person for him; that, as there can be no manual delivery of the credit which the donor has in the bank, the delivery of the book which represents the deposit, and is the only evidence in the possession of the donor of his contract with the bank, together with an order or assignment, operates as a complete transfer of the existing fund, and is all the delivery of which the subject is capable." Pierce v. Bank, 129 Mass. 430, and cases cited; Davis v. Ney, 125 Mass. 590; Hill v. Stevenson, 63 Me. 367; Camp's Appeal, 36 Conn. 88. In Ridden v. Thrall, 125 N. Y. 572, 577, 578, 26 N. E. 627, it was held that the deposit book in a savings bank answers the same purpose as a certificate of deposit in other banks, and that any delivery which transfers to the donee either the legal or equitable title is sufficient to effectuate a gift; and a gift of the moneys due a depositor, by delivery of the deposit book, was upheld, notwithstanding a by-law of the bank, printed in the book, required an order or power of attorney when some person other than the depositor attempted to draw the money; and the donee in that case had no such power, but the court held that he had the same right to enforce payment that he would have had if he had been the donee of any nonnegotiable chose in action or a certificate of deposit or unindorsed note, and could establish his right to payment in such case by any proof showing that he was the absolute legal owner. It is well settled that in order to constitute a valid assignment of a debt or other chose in action, in equity, no particular form of words is necessary. Any words which show an intention of transferring or appropriating the chose in action to the assignee for a valuable consideration are sufficient; nor is any written instrument required. Any order, writing, or act which makes an appropriation of the fund amounts to an equitable assignment, and an oral or written declaration may be as ef-

fectual as the most formal instrument. An order for or payable out of a particular fund, not only as between the drawer and payee, but as regards the drawee, will so operate, though not accepted by him. 1 Amer. & Eng. Enc. Law, 835, and cases cited, ubi ut supra. The same is true as to gifts of choses in action, if a delivery, or what in judgment of law amounts to such, takes place. In Wilson v. Carpenter, 17 Wis. 516, Cole, J., says: "Delivery is essential, both at law and in equity, to the validity of a parol gift of a chattel or chose in action; and it is the same whether it be a gift inter vivos or causa mortis. Without actual delivery the title does not pass;" and he quotes 2 Kent, Comm. 554, where the author says: "Delivery in this, as in every other, case must be according to the nature of the thing. It must be an actual delivery, so far as the subject is capable of delivery. It must be secundum subjectam materiam, and be the true and effectual way of obtaining the command and dominion of the subject. If the thing be not capable of actual delivery, there must be some act equivalent to it. The donor must part not only with the possession, but with the dominion, of the property. If the thing given be a chose in action, the law requires an assignment, or some equivalent instrument, and the transfer must be actually executed." Henschel v. Maurer, 69 Wis. 576, 34 N. W. 926; Brunn v. Schuett, 59 Wis. 269, 272, 18 N. W. 260. In Elam v. Keen, 4 Leigh, 333, an oral gift of a bond in suit, accompanied by a delivery of the attorney's receipt for it, was held a valid gift of the bond. Carr, J., saying: "The bond itself could not be delivered. It was in court, in the custody of the law. The receipt was its representative. * * * As in case of the key, the delivery of the receipt 'was the true and effectual way of obtaining the use of the subject.' Speaking from my own experience, I should say an attorney requires no better order for the payment of money he has collected on a bond than the receipt he has given for the bond. When he takes this in, with a receipt upon it for the money, he feels himself safe." In this case, superadded to the receipt given by the bank for the bonds and coupons, was an order from the party depositing them for conversion, written upon the receipt itself. Moore v. Darton, 4 De Gex & S. 517, 520; Walsh's Appeal, 122 Pa. St. 177, 187–190, 15 Atl. 470. In Stephenson v. King, 81 Ky. 425, it is shown that the arbitrary rule requiring an assignment and delivery of the identical thing in order to make a gift of it valid has been abandoned; and the language of the court in Elam v. Keen, supra, that "there are many things of which actual manual tradition cannot be made, either from their nature or situation at the time. It is not the intention of the law to take from the owner the power of giving these. It merely requires that he shall do what, under the circumstances, will, in reason, be equivalent to an actual delivery," —was approved; and it was held that "there is no reason why the intention to give with the actual delivery of the written evidence of the right to the thing, although in the possession of another, under the belief of the donor that it perfects the gift, should not be held to constitute a valid gift causa mortis." But, as already noticed, there was here the written order of the donor on the cashier of the bank, indorsed on the receipt itself; and it is alleged in the answer that by the delivery to Mitchell of these instruments Mrs. Austin intended to give, and did give, the fund in question to Mitchell. The terms of the order, it is true, are ambiguous, and it is argued that it amounted only to an authority to Mitchell to receive the money as Mrs. Austin's agent. The averment of intention to give an actual gift answers this objection for the purposes of this demurrer, for we think that, as the language of the order is ambiguous, it is entirely clear that parol evidence of what occurred at the time is competent to show that the order and delivery of the receipt were intended by Mrs. Austin to operate as a present gift, and not as a mere authority to receive the money for her use, as that the delivery of the receipt and order was accompanied with words of present gift, or that other contemporaneous facts and circumstances justified that conclusion. We therefore hold that the delivery of the receipt, with the order indorsed with the intention of giving the chose in action—the fund due from the bank—to Mitchell, constituted a valid gift to him of the money due from the bank to plaintiff's intestate.

We think that it is a fair inference from the allegations of the second defense that the action in which the plaintiff as administrator recovered judgment against Charles Mitchell and others in the circuit court for Sauk county, for the same money sued for by him in this action, was an action ex contractu for money had and received by them to his use, and the question is whether the plaintiff did not thereby affirm that the money was properly paid over by the defendant bank to them, or to Charles Mitchell for his use, so as to preclude him from now asserting as a basis of recovery in this action that such payment was wrongful. The rule is universal that where a party has a choice between two inconsistent rights or remedies, and deliberately makes his choice, such election becomes conclusive upon him, and precludes him from subsequently adopting the other. Mariner v. Railroad Co., 26 Wis. 89; Warren v. Landry, 74 Wis. 144, 42 N. W. 247; Curtis v. Williamson, L. R. 10 Q. B. 57; In re Davison, 13 Q. B. Div. 54. If the alleged gift to Mitchell was void or inoperative for any reason, the bank still remained the debtor of Mrs. Austin, and the money it paid to Mitchell was its own money, and the plaintiff had no claim whatever to it. This money so paid could not become the money of the plaintiff except

upon his ratification of the act of Mitchell in collecting and of the bank in paying it to him; so that the money he thus received from the bank became and was money received and held by him to and for the use of the plaintiff, and the plaintiff could have no claim to it but by electing to treat it as he did by suing for and recovering it as his money in the hands of the defendants in that action. He could not treat them as his debtors for the money had and received from the bank to his use, and recover against them on that ground, and thereafter sue and recover the same sum from the bank as being still indebted to him. He could not sue and recover in both actions, at the same time, nor in succession. His rights and remedies ex contractu against Mitchell and others and against the bank were alternative, and not concurrent; and it must follow necessarily that the recovery against Mitchell and others, although not collectible, necessarily extinguished his cause of action in indebitatus assumpsit (for it is in that form) against the bank. Numerous authorities were cited by the respondent's counsel sustaining this view of the case, among which is the case of Fowler v. Bank, 113 N. Y. 450, 21 N. E. 172, which was a case where a person entitled to a savings-bank deposit, which had been paid without authority to another person, had a right of action therefor against the bank as debtor and one against the party so receiving it, for money had and received; and it was held that by bringing either action he lost the right to the other, and that a judgment against the party who wrongfully received the money from the bank, although uncollectible, was a bar to an action against the bank. This case seems to have been thoroughly discussed, and has been cited elsewhere with approbation, and was affirmed in Terry v. Munger, 121 N. Y. 161, 24 N. E. 272, and subsequently the same point was decided in a well-reasoned opinion in Assurance Co. v. May, 82 Ga. 646, 9 S. E. 597. The case is the same in principle as where a party who has waived the tort by conversion of personal property by suing in assumpsit is held precluded from thereafter maintaining trover against the defendant's vendee of the same property. Nield v. Burton, 49 Mich. 53, 12 N. W. 906; Farwell v. Myers, 64 Mich. 234, 31 N. W. 128. The subject of election between inconsistent remedies, and the effect of such election, are quite fully considered in Crossman v. Rubber Co., 127 N. Y. 34, 37–39, 27 N. E. 400, in which Fowler v. Bank, supra, is cited with approval. It would have been a singular application of legal principles, indeed, if the plaintiff had prosecuted both these actions in the same court at the same time, that would permit the plaintiff to recover against Mitchell and others on the ground that they had had and received this money from the bank to his use, and so to obtain judgment against them, and, the suit against the bank being called for trial, would allow him to recover the same money against the bank on the ground that it had not been paid to Mitchell to the plaintiff's use, but the bank still was indebted to the plaintiff for it. The remedies pursued by the plaintiff in the two actions are not concurrent, as in the case of several actions against joint trespassers and the like, where both actions proceed upon the same identical facts as a foundation of a recovery, and in which the right involved in either case is entirely consistent with that in the other. It will be found, upon close examination, that in no case can remedies be regarded as consistent unless predicated upon consistent allegations or grounds of recovery. Here, as already stated, the ground of recovery in the suit against Mitchell and others was that they had received the money from the bank due to the plaintiff to his use, and this is inconsistent with the allegation in this case that the bank still remained indebted to him therefor. The positions are mutually contradictory. The defendant bank may have materially changed its position upon the faith of the assertion and election of the plaintiff in the former action, so that it would be unjust to allow the plaintiff now to retract the claim that Mitchell and others had received the money from the bank to his use, and now insist in this action, as a basis of recovery, that the former allegation is untrue, and the bank still remains indebted to him for the money. Both allegations cannot be true. Warren v. Landry, 74 Wis. 144, 42 N. W. 247; Morris v. Rexford, 18 N. Y. 552; Rodermund v. Clark, 46 N. Y. 354; Moller v. Tuska, 87 N. Y. 166, 169. We think the remedies pursued by the plaintiff are inconsistent; that, by electing to pursue and charge Mitchell and others for money had and received from the bank, the plaintiff elected to affirm the payment made by the bank to Mitchell, and that he cannot now be heard to say that the payment was without authority, and that the bank is still indebted to him, as administrator, for the money. The order of the circuit court, overruling the plaintiff's demurrer to the defendant's answer, must therefore be affirmed. The order appealed from is affirmed.

WYLIE v. CHARLTON et al. (two cases).

(62 N. W. 220, 43 Neb. 840.)

Supreme Court of Nebraska. Feb. 6, 1895.

Appeal from district court, Buffalo county; Holcomb, Judge.

Action by Emma Wylie against William Charlton and others, heirs of Ann Charlton, to have certain property declared to be her property. An action by James W. Wylie, husband of said Emma Wylie, against the same defendants, to enforce the specific performance of a contract made by said Ann Charlton. The cases were consolidated. From the judgment in the case of Emma Wylie the defendants appeal, and in the case of James W. Wylie the plaintiff appeals. Affirmed.

Lamb, Ricketts & Wilson and Dryden & Main, for appellants. Calkins & Pratt, for appellee.

IRVINE, C. These two cases are based on separate records, but present the same state of facts, and were apparently tried together, under a stipulation which provides that the evidence taken in one shall be considered in the other, with the exception of the evidence of James W. Wylie. They are founded on the same contract, and, while presenting some points of difference, are in so far identical that a single opinion treating both cases will economize space, and, perhaps, best present the questions involved.

One case was begun by James W. Wylie, and the other by Emma Wylie, his wife. That by James Wylie made defendants the heirs and administrator of Ann Charlton, deceased. The defendants in Emma Wylie's case were the same, except that she herself was a defendant in James Wylie's case. Each petition alleged that in January, 1886, Ann Charlton, a widow, was the owner in fee simple of the N. W. ¼ of section 8, township 11, range 18 W., and the equitable owner, by virtue of a contract of sale from the Union Pacific Railway, of the E. ½ of the N. E. ¼ of section 7. It will be observed that the 80 acres last described adjoin the quarter section first described, and lie immediately west thereof. The petitions further alleged that on January 20, 1886, James Wylie married Emma, the daughter of Ann Charlton, whereupon Ann Charlton agreed with Wylie and wife that if they would remove to Buffalo county, live upon, improve, and cultivate said lands, Ann Charlton would give to her daughter Emma the 80-acre tract in fee simple, free from all incumbrances, and would sell to James Wylie the quarter section for the sum of $2,000, to be paid when James should have sufficiently stocked said land, and that meanwhile James should pay to Ann Charlton such rent as might be agreed upon in lieu of interest on the $2,000; that this proposition was accepted, and that Wylie and wife moved upon said land, and have ever since resided thereon; that they have improved and cultivated the same, and performed all the conditions of the contract on their part; that in October, 1889, it was agreed between Wylie and Mrs. Charlton that the purchase money for the quarter section should be paid, and the conveyance made in the fall of 1890; that on June 6, 1890, Ann Charlton died, intestate, leaving, as her heirs, William Charlton, her son, Ella Charlton, Elizabeth Stevens, and Emma Wylie, her daughters, and William Charlton, second, her grandson; and that William Charlton was her administrator. The prayer in each petition was for a specific performance of the contract. The answers admitted the relationship of the parties, the death of Ann Charlton, and the ownership by her of the land described, and denied all other allegations of the petition. In James Wylie's case the court found for the defendants, and dismissed the case. In Emma Wylie's case the court found for the plaintiff, and decreed specific performance as to the 80 acres. As we have said, the evidence was the same for the most part in both cases. The difference was this: that in Emma Wylie's case the court permitted James Wylie, her husband, to testify as to conversations with the deceased which constituted the parol contract which it was sought to enforce. In James Wylie's case the court excluded the testimony of Mrs. Wylie as to the same facts. Neither party attempted to testify in his own behalf as to such conversations. The result was that in Emma Wylie's case there was direct evidence from her husband as to the contract; in James Wylie's case there was no direct evidence. From the decrees so rendered, appeals have been taken,—in Emma Wylie's case, by the defendants; in James Wylie's, by the plaintiff.

In the case of Mrs. Wylie the ground of the appeal is that the decree is not sustained by the evidence. It is not urged that the court erred in admitting the husband's testimony. One point relied upon is that the contract proved did not, with sufficient certainty, describe the land. It is true that Wylie's testimony is simply to the effect that Mrs. Charlton agreed to convey to her daughter "one of the eighties." This would be uncertain standing alone, but there is evidence that, when the plaintiffs moved upon the land, they occupied a sod house standing on the quarter section, and that Wylie thereafter erected a barn across the section-line road on the 80-acre tract claimed by Mrs. Wylie; that, while this barn was being erected, Mrs. Charlton was present, and a discussion arose as to where it should be placed, Mrs. Charlton expressing an intention of erecting a house for her daughter on the 80-acre tract, and thinking for that reason the barn should be placed on the quarter section. To this the Wylies

responded that, in case they should desire to sell either tract, it would be better that both house and barn should be on the same tract. Mrs. Charlton assented to this, and the barn was for that reason placed on the 80 acres. There is some other evidence tending to show a recognition by Mrs. Charlton of the 80-acre tract claimed as that which was to be conveyed to her daughter. We think that this evidence was sufficient to identify the tract, and to sustain the finding of the trial court in that particular.

In addition to this point, the defendants contend that equity will not interfere to complete an imperfect gift. Of the cases cited in support of that point, Walsh's Appeal, 122 Pa. St. 177, 15 Atl. 470, is a fair illustration. That was a case in which it was sought to enforce a donatio mortis causa. The gift failed, because of a want of the appropriate elements to support such a gift. The contract alleged would present no such case. It presents a case of a parol gift of land, followed by possession and making of improvements. That such a gift will be sustained and enforced in equity is no longer an open question in this state. Dawson v. McFaddin, 22 Neb. 131, 34 N. W. 338; Ford v. Steele, 31 Neb. 521, 48 N. W. 271. See, too, Neale v. Neale, 9 Wall. 1; Brown v. Sutton, 129 U. S. 238, 9 Sup. Ct. 273.

It is still further urged that the proof in this case lacks the requisite degree of certainty, and, in support of that contention, counsel call attention to the rule announced in many cases, of which Allison v. Burns, 107 Pa. St. 50, is an extreme example, to the effect that, in order to sustain a parol gift of land, it must be established by credible proof, of such weight and directness as to make out the facts beyond a doubt; that possession must have been taken and maintained and improvements made on the faith of the promise to convey; and that compensation in damages would be inadequate. We do not question that this rule, somewhat qualified, is a safe one to pursue in weighing the evidence. The courts have, perhaps, gone so far in the way of declaring exceptions to the statute of frauds that the efficacy of the statute has been endangered, and care should be taken in such exceptional cases to avoid the mischief which the statute endeavored to prevent. But we cannot accept the rule referred to as a rule of law governing the review of a case. To accept it as such would require in a civil case at least as high a degree of certainty as in a criminal case. As said by Norval, J., in Stevens v. Carson, 30 Neb. 544, 46 N. W. 655: "It has been repeatedly held by this court, in civil cases, that the party holding the affirmative of an issue is only required to establish it by a preponderance of the evidence." To adopt any rule which, as a matter of law, requires a higher degree of proof in any civil case, would conflict with the rule so established. The true rule is stated in Neale v. Neale, 9 Wall. 1, which is that the law requires no more than that the case as stated be made out with reasonable certainty. The fact that the gift lies in parol, the fact that a temptation exists to make out a false case, and, in such cases as this, the fact that the person by whom the parol testimony might be contradicted is dead, are merely facts affecting the weight of the evidence. They are proper for consideration in determining on which side the preponderance of the evidence lies. But they do not require a different rule as to the degree of evidence required.

In this case we think the terms of the contract were shown with reasonable certainty. There is no doubt that the Wylies moved upon the land at the time alleged; that they continued to reside there; that they made lasting and valuable improvements. There was some evidence tending to overcome the proof so made: In the first place, the facts already referred to, which in their nature are calculated to arouse suspicion in all such cases. In the second place, there is evidence that Wylie habitually, after the first year, divided the crop, giving to Mrs. Charlton one-third thereof. In the next place, some admissions of Wylie are shown conflicting with his claim of title, and it was shown that he filed a claim against Mrs. Charlton's estate for the expense of the improvements. But the admissions and acts of Wylie, while competent as against himself, should not be considered in her case, and it seems that the district judge did consider them in his case, and not in hers. The evidence in Mrs. Wylie's case, therefore, fairly conflicts. There was sufficient to support the finding of the district court in her favor, and that finding will not be disturbed.

The case of James Wylie presents a different aspect. It lacked all direct proof of the contract relied upon to sustain it. The only evidence to sustain the case was proof of possession by the Wylies, and of improvements made on the land. There was the same evidence as in Mrs. Wylie's case to meet this, and, in addition thereto, the evidence as to Wylie's filing a claim against the estate for the improvements, and as to his declarations, was competent, and entitled to some weight. The declarations were somewhat ambiguous, and perhaps entitled to little weight, and his act in filing the claim against the estate was by him explained in such a manner that the trial court might have been justified in accepting the explanation, and giving little or no force to his act; but there being no evidence in his case to establish the contract, except that afforded by his possession and by the making of improvements, and the evidence of declarations by Mrs. Charlton, and there being on the part of the defendants some evidence of declarations contrary to his claim of right, evidence of his making a claim against the

estate inconsistent with that claim of right, and, in addition thereto, to circumstances presenting at once the opportunity and the temptation to now make a false claim, we think it was for the trial court to determine whether or not a preponderance of evidence existed in his favor. The trial court found the issues against him, and its finding should not be disturbed, unless the court erred in excluding the testimony of Mrs. Wylie, which was offered as direct proof of the contract.

Mrs. Wylie's testimony was undoubtedly excluded upon the theory that it fell with the prohibition of section 329 of the Code of Civil Procedure, which is as follows: "No person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness, unless the evidence of the deceased person shall have been taken and read in evidence by the adverse party in regard to such transaction or conversation, or unless such representative shall have introduced a witness who shall have testified in regard to such transaction or conversation, in which case the person having such direct legal interest may be examined in regard to the facts testified to by such deceased person or such witness, but shall not be permitted to further testify in regard to such transaction or conversation." Many years ago it became apparent that the common-law rule rendering incompetent as witnesses all persons interested in the result of an action was impolitic, and not adapted to the institutions of modern civilization. The injustice done by excluding such witnesses was manifestly a greater evil than that resulting from admitting their testimony, and thus affording a temptation to perjury. The legislatures then began to make inroads upon the rule, until the broad step was taken, which has been embodied in our Code of Civil Procedure, of enacting that every human being shall be a competent witness in all cases, except under certain contingencies, expressly provided for. Code Civ. Proc. § 328. In these progressive steps of legislation, a great variety of statutes appeared, at first extending the competency of witnesses, and then, in connection with such broad provisions as are found in section 328 of our Code, limiting their competency in certain cases. The legislatures have quite generally recognized the fact that, when one party to a transaction had died, the other party should not be permitted to testify to such transaction as against the representatives of the deceased; but the methods by which the legislatures have sought to accomplish this are so varied, and the decisions under such statutes are so numerous, that it is scarcely practicable to review the authorities, and induce from them a rule for guidance in the case before us. Especially is this true because the decisions have turned so much upon the phraseology of the statutes. A reference to a few cases cited in argument will demonstrate this fact. In Iowa it is held that a party adverse to the representative of a deceased cannot examine a witness as to a conversation with the deceased when such witness is interested on behalf of the representative, and adversely to the party calling him. Neas v. Neas, 61 Iowa, 641, 17 N. W. 30; Ivers v. Ivers, 61 Iowa, 721, 17 N. W. 149; Donnell v. Braden, 70 Iowa, 551, 30 N. W. 777. But these cases construe a statute which provides that "no party to an action or proceeding, nor any person interested in the event thereof, * * * shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the commencement of such examination, deceased, insane, or lunatic against the executor, administrator, heir at law, next of kin, assignee, legatee, devisee, or survivor of such deceased person," etc. The language of this statute is quite plain, although it extends the prohibition beyond the reason thereof. So in Ellis v. Alford, 64 Miss. 8, 1 South. 155, a husband and wife joined in a bill to have the wife's conveyance of her separate estate canceled, on the ground of fraud. It was held that in such a case the testimony of the wife was incompetent, but that of her husband was competent. But this was under a statute simply providing that "no person shall testify as a witness to establish his own claim to any land for or against the estate of a deceased person." The statute excluded only the testimony of one on his own behalf. So, in like manner, a comparison of statutes of other states with ours generally discloses such a difference in language that their decisions are not applicable to our law. Or, if applicable at all, only to a limited extent. It is therefore necessary to solve the question presented without much reference to adjudications based on other statutes.

It will be observed that Mrs. Wylie was interested on both sides of the record. If the plaintiff prevailed, she would become entitled to an inchoate estate of dower as the plaintiff's husband. If the defendants prevailed, she would be entitled, apparently, to a one-fifth interest in the land, as heir of her mother. Three questions are in effect thus presented: First. Was her interest as the wife of the plaintiff such a direct legal interest as to disqualify her? Second. Was her interest as heir such as to disqualify her when called to testify adversely to that interest? Third. Assuming that either or both of such interests rendered her incompetent, did the fact that she was interested on both sides remove the disqualification? In solving these questions, some allusion to the common law may be useful, if not necessary. It must be remembered that at common law any interest in the event rendered a witness absolutely incompetent, and that such inter-

est was not necessarily a direct or a legal interest. It was said that "the true test of the interest of a witness is that he will either gain or lose by the direct legal operation and effect of the judgment, or that the record will be legal evidence for or against him in some other action." 1 Greenl. Ev. 390. It was also said that such interest must be present, certain, and vested; but, by examining the cases cited in the admirable discussion of the subject in the text-book cited (Id. §§ 390–430), it will be seen that interests in some cases quite indirect were considered sufficient to exclude the witness. Our Code seeks, in section 328, to remove all disqualifications, and then, by subsequent provisions, to establish certain limited disqualifications; and it is not unreasonable to infer that the legislature meant by section 329 to retain in force the common-law disqualification in so far as it fell within the language of the statute. This is the construction placed by the supreme court of Iowa upon the statute of that state. That court holds that, in determining what interest is sufficient to exclude the testimony, the common-law tests apply. Wormley v. Hamberg, 40 Iowa, 22; Goddard v. Leffingwell, Id. 249. Such, too, seems to be implied in this state from the case of Ransom v. Schmela, 13 Neb. 73, 12 N. W. 926, where it was held that a liability for costs in the action was a direct legal interest, which rendered a witness incompetent. This was one of the interests which rendered a witness incompetent at the common law. But, while it seems clear that the term "interest" was used in our statute in the common-law sense, it is equally clear that, by restricting the disqualification to those having a direct legal interest in the action, the legislature intended to admit the testimony of some persons having interests not direct or not legal which at common law would have excluded them.

In this state, a woman, by marriage, becomes entitled to an inchoate estate of dower in all the land whereof the husband is seised of any estate of inheritance during the coverture. Comp. St. c. 23, § 1. This is an interest which, when it once attaches, remains and continues a charge or incumbrance upon the real estate, unless released by the voluntary act of the wife, or extinguished by operation of law. A sale of land under execution upon a judgment against the husband alone will not defeat it. Butler v. Fitzgerald (decided at the present term) 61 N. W. 640. While the estate thus acquired is not one in possession, it is such a present vested interest, of a legal character, and creates such a direct legal interest in an action to establish title in her husband, as falls within the inhibition of section 329. The object of this section was to prevent a party testifying against the representatives of a deceased person where the interest of such party in the result of the action is of such a character as to hold out a temptation to perjury to such an extent as to run counter to the policy of the law. Surely, the acquisition of an estate, even one to take effect in futuro, but of such a character as to be recognized at law, and not capable of being defeated by any act of the tenant, presents such an interest. We are aware that at common law it was held that the interest of an heir apparent did not disqualify him, but no one could be the heir of a living person. No present interest was recognized in the heir apparent. His estate might be defeated by the conveyance or will of his ancestor. The law does recognize an inchoate estate of dower, and no act of the husband can defeat such estate. To the first question proposed we therefore answer that Mrs. Wylie, as the wife of the plaintiff, did have such an interest as to bring her testimony within the prohibition of section 329, and that the district court did not err in excluding her testimony as to conversations with Mrs. Charlton.

Counsel argue that, aside from this interest, her interest as heir disqualifies her from testifying on behalf of her husband adversely to such interest, and, in support of that contention, cite the Iowa cases above referred to. But, as we have pointed out, those cases construed a statute plain in its terms, and, by its express terms, going beyond the reason which led to its enactment. It was not for the court, in spite of such direct language, to confine the statute so as merely to meet the mischief which it was sought to prevent. Our statute does not contain such words. The defendants would have it construed as if it read that no person having a direct legal interest in the result of an action shall be permitted to testify when the party adverse to the one calling him is a representative of a deceased person. Having in view the common-law rule as to competency, and the mischief which this statute sought to prevent, it should be construed as if it read that no person having a direct legal interest in the result of an action shall be permitted to testify when the party interested adversely to the witness' interest is the representative of a deceased person.

It still remains to be considered whether the fact that Mrs. Wylie was interested on both sides of the record rendered her competent. At common law, it was said that, if the witness is equally interested on both sides, he is competent, but, if there is a certain excess of interest on one side, he will be incompetent to testify on that side. 1 Greenl. Ev. § 391. An inspection of the cases upon which that statement is based discloses, however, that the courts did not attempt to weigh different interests, one against the other, but admitted the testimony only where the interest was precisely the same. Thus, in Ilderton v. Atkinson, 7 Term R. 480, a witness was held competent because, whichever way the action resulted, he was bound to pay the amount involved,

according to its event, either to one party or to the other. To the same effect is Birt v. Kersbaw, 2 East, 458. In other cases a witness was held incompetent because, while there was an equal liability in one way on either side, the success of the party calling him would relieve him from a distinct and additional liability. Jones v. Brooke, 4 Taunt. 464; Larbalestier v. Clark, 1 Barn. & Adol. 899. Where interests are precisely equal on either side, it may be that the case is out of the reason of the common law, although not out of the letter of our statute; but, where there is an interest adverse to the representative of the deceased, we do not think that the courts, without any standard of comparison, should attempt to weigh that interest against an interest of a different character on the side of such representative, and so undertake to say that the interest on behalf of the representative is greater than that against him, and that an exception to the statute should in that case be made. Where the interest is the same on either side, it may, perhaps, be said that there is not, within the meaning of the statute, any interest in the event of the action; but, where the interests are different in character, the only safe rule is to follow the statute, and exclude the witness' testimony.

We think the district court ruled correctly on this point, and the result is that both judgments should be affirmed.

BELLIS v. LYONS.

(56 N. W. 770, 97 Mich. 398.)

Supreme Court of Michigan. Nov. 10, 1893.

Error to circuit court, Macomb county; Arthur L. Canfield, Judge.

Action of trover by Victoria E. Bellis against Watson W. Lyons to recover the value of certain notes and mortgages which defendant, as special administrator of the estate of Thomas Morgan, deceased, claimed belonged to such estate, and refused to deliver to plaintiff. There was a judgment for defendant, and plaintiff brings error. Affirmed.

The other facts fully appear in the following statement by GRANT, J.:

The defendant was the sepcial administrator of one Thomas Morgan, deceased. As such, he took possession of 22 promissory notes given to said Morgan in his lifetime. Some of the notes were secured by chattel and real-estate mortgages. Plaintiff, claiming title to said notes by gift and delivery by Morgan, after demand and refusal on part of defendant to surrender them, brought this action of trover to recover their value. The court directed a verdict for defendant, on the ground that plaintiff had failed to establish her ownership of the notes. The estate inventoried $8,107.72, of which the real estate was $4,300, and the notes in question, $3,624. Morgan had been twice married. He had had two children, both of whom died without issue. After the death of his wife and children, he continued to live in his homestead, sometimes alone, and sometimes employing a housekeeper. Eighteen months before his death, he employed plaintiff as his housekeeper. She lived with and took care of him, during the rest of his life. He executed a will September 7, 1889, by which he devised his property to some neighbors and relations, giving specific bequests to each. By the third clause of his will, he provided as follows: "In case my present housekeeper, Victoria Bellis, shall remain with me, as such housekeeper, until my death, as her compensation for so doing, in addition to such payment as I make her during life, I give and devise to her that certain lot of land situate in the township of Ray, in the said Macomb county, Michigan, known as the 'Ray Exchange,' and as well as the two pieces and parcels of land adjoining the said Ray Exchange, owned by me, and the further sum of five hundred dollars. But in case she shall not so remain with me, as my housekeeper, until my death, then and in that case she is to have out of my estate only her wages, at the rate of one dollar a week." After the specific bequests, he bequeathed the residue of his estate to all the legatees named in the will, except the plaintiff, to be distributed between them in proportion to the specific legacies given. He died on the 31st day of January following. Plaintiff claims title by gift from Morgan two or three days before his death. Some of the notes were payable to the order of Mr. Morgan, while others were nonnegotiable. None of the notes were indorsed by Morgan, nor were any of the securities assigned to plaintiff. Neither was there any written evidence of gift or transfer. Her counsel insist that there was evidence from which a jury would be justified in inferring a completed gift and delivery. It becomes, therefore, necessary to give the evidence upon which this claim is based. Plaintiff herself testified that, when defendant came and asked for the notes, they were in her hand satchel, in the bureau drawer, and that they had been there two or three days before Morgan's death. One Chester Cooley testified that he had a conversation with Morgan the latter part of December, 1889, about plaintiff and his property; that he said to Morgan, in a laughing and joking way, " 'The woman is taking care of your house and you in good shape; and you, getting old and feeble as you are, ought to do well for her.' Says he, 'I have, already.' Says I, 'What have you done?' Says he, 'I have given her somewhere near $3,000.' " One Heydenrach testified that he borrowed $1,000 of Mr. Morgan June 26, 1889, for which he gave him a note, and real-estate mortgage; that Morgan asked plaintiff if he should let witness have it, to which plaintiff replied, "Yes;" and that Morgan said that he did not care, for it was her money. After this conversation, Morgan loaned witness the money, taking the note and mortgage in his own name. One Lathrop testified that he had a conversation with Morgan, but he cannot fix the year nor the time of year it occurred, in which he said, "If Mrs. Bellis did as well as she had, he'd give her all he had. He told about her doing first-rate. I have heard him tell of giving to others." One Miller, a brother of plaintiff, testified that Morgan asked him to talk with his sister in regard to going there to keep house for him; that he said if she would go there, and take care of him as long as he lived, he would give her his property. Witness did not communicate this, however, to the plaintiff; that he had heard plaintiff joke Morgan in regard to his having trouble to collect his accounts; and that Morgan said, "Well, when I am gone, I would like to see what a time you will have in collecting these notes." One Freeman testified that Morgan spoke to him several times about his will; that it was not satisfactory to him; that he said plaintiff should never want for anything while she lived; that he would provide for her so that she should have a good living while she lived; and that he intended to make another will. These conversations were during his last illness. One Hillock testifies that he had a conversation with Morgan the day before he died, in which he said: " 'I have made a will. It is all wrong.

There is parties I have left some of my property to, that it would not go to, if I got able to make a will again.' And he spoke about this lady, his housekeeper. He said she had been very kind to him, and she deserved all he had. He said, 'I have made some provisions for her, but not such as I will do, if I recover from this sickness.'" When the defendant and the appraisers went to the house to make an inventory and appraisal of the estate, plaintiff told defendant, before he had alighted from his carriage, that he must not inventory these notes, as they belonged to her; that Morgan had given them to her. She was induced, however, to produce the notes, which she did, from a hand satchel kept in a bureau drawer belonging to Mr. Morgan, and to which she had the key. The above is the substance of the evidence tending to support the plaintiff's claim. There are, however, other undisputed facts bearing upon it. On January 28th, three days before he died, plaintiff wrote a letter, at Mr. Morgan's dictation, to Mr. Eldredge, which letter is as follows: "I wrote you, not long since, asking you to make a change in my executor in my will; in place of Mr. Mawry, to put in Watson Lyons. I want you to let me know by return mail if you have complied with my request." February 3, 1890, plaintiff executed a sworn petition to the probate court, praying for the probate of the will, in which she stated that the estimated value of the personal estate was $3,000, and of the real estate $5,000. At the same time, she presented another petition, praying for the appointment of the defendant as a special administrator, in which she represented the personal estate to consist of live stock, notes, and mortgages, and that a chattel mortgage needed renewing, and, if not renewed on or before a certain date, it was liable to be lost to the estate, and that there was no one to take care of the notes, mortgages, and papers. The notes now claimed by her are all that Mr. Morgan had. Of these, three were not at the time in his possession, but for some time previous to his death had been in the hands of attorneys for collection. At the time of executing the petition, she made no claim to these notes. The will was at that time read to her, and she admitted that she then said, "The will was not as I had been informed it was to be; as it has been represented it was to be."

Crocker & Crocker, for appellant. Eldredge & Spier, for appellee.

GRANT, J., (after stating the facts.) Plaintiff's counsel claim that the notes were given to her by Morgan two or three days previous to his death. The record, however, is barren of any evidence tending to show that he then delivered them. The presumption is that the title remained in him. The testimony of the witnesses Freeman and Hillock shows conclusively that he had not, at that time, delivered them to her. She was his housekeeper, and was the proper custodian of his papers and property upon the homestead until an administrator was appointed. It was indispensable to the plaintiff's ownership for her to show, by clear and convincing proof, not only that Mr. Morgan had made statements showing an intention to transfer the title, but that he had performed his intention by actual delivery. The notes were in his house, and in his bureau. Under these circumstances, her possession created no presumption in her favor. Possession and production of the negotiable notes, unindorsed by him, would not have constituted evidence of ownership, in a suit brought by her against him while living. Redmond v. Stansbury, 24 Mich. 445. Furthermore, her failure to assert ownership at the time she executed the sworn petition to the probate court; the statements therein contained, that these notes belonged to his estate; her knowledge that he had executed a will, and, when its provisions were read, her statement that it was not what she expected; and the fact that Mr. Morgan, a business man, made no transfer by indorsement or other writing; and the ample compensation for her services given by his will,—are conclusive evidence against her claim. Judgment affirmed. The other justices concurred.

See Ridgway v. McCartney, 57 Ill. App. 453.

BOOTH v. BRISTOL COUNTY SAV. BANK et al.

(38 N. E. 1120, 162 Mass. 455.)

Supreme Judicial Court of Massachusetts. Bristol. Nov. 30, 1894.

Exceptions from superior court, Bristol county; Edgar J. Sherman, Judge.

Action by Joseph Booth against the Bristol County Savings Bank to recover the amount of certain deposits. John Booth was summoned as defendant claimant to said funds. Judgment for defendant claimant, and plaintiff excepts. Exceptions overruled.

On trial of this action, the savings bank book standing in the name of Joseph Booth was introduced in evidence, which showed various sums deposited and withdrawn, from 1886 to 1894, by the plaintiff. The plaintiff testified that the defendant claimant, John Booth, his father, gave him all money so deposited as a present, and that the book had always been kept in a place known only to plaintiff and claimant. This the defendant claimant denied; said that he himself had always had possession of the book from the time of its issuance; that he had never given any of said money to the plaintiff; that it was deposited in the plaintiff's name because the defendant claimant was nervous and a poor writer, and for the sake of convenience; and that the plaintiff was, in the matter, acting as the defendant claimant's agent. The defendant claimant called several witnesses whose testimony tended in some particulars to corroborate his claim. It was admitted that all the money so deposited was originally the money of the defendant claimant. There was no evidence that the defendant claimant ever gave the book to the plaintiff, except when the claimant ordered the plaintiff to make withdrawals or deposits. A bank clerk testified that the bank never saw, and did not know, the claimant in the matter. The claimant had another deposit and book in the same bank, commencing subsequently to the first deposit on this book, when that deposit had reached over $1,000.

Fred V. Fuller, for plaintiff. Bennett & Hall, for defendant John Booth. William H. Fox, for defendant Bristol County Sav. Bank.

LATHROP, J. The first instruction requested in this case was rightly refused. The exceptions expressly state that "there was no evidence that the claimant ever gave the book to the plaintiff, except when the claimant ordered the plaintiff to make withdrawals or deposits." The second request for a ruling was also rightly refused. The plaintiff contends that where A. deposits money in a savings bank in the name of B., and takes out a book in the name of B., this is an executed gift to B., and the money belongs to him. For this position he cites Sweeney v. Bank, 116 Mass. 384. It was there held that where a man deposits money in a savings bank in the name of his wife, and has the bank book made in her name and delivered to her, he cannot maintain an action against the bank for its refusal to pay the money to him. This was so decided on the ground that there was no contract between the bank and the plaintiff to pay the money to him. In this case there was no evidence that the money was deposited by the wife as the agent of her husband; and the case was distinguished on this ground from the case of McCluskey v. Institution for Savings, 103 Mass. 300, where it was held that it was a good defense on the part of the bank, to a suit by a wife, that money deposited in her own name was so deposited at her husband's request and for his benefit, on the ground that these facts would defeat the inference of a gift arising from a deposit in the wife's name, and show that she was acting as her husband's agent. In the case at bar, no question of procedure arises. The claimant is properly before the court, having been summoned in under the provisions of St. 1894, c. 317, § 33 (Pub. St. c. 116, § 31); and the only question is whether the plaintiff or the claimant has the better title to the funds. A deposit in a savings bank in the name of another is not alone sufficient to prove a gift. Brabrook v. Bank, 104 Mass. 228; Sherman v. Bank, 138 Mass. 581, and cases cited; Broderick v. Bank, 109 Mass. 149. Nor is the fact that the savings bank book designates the depositor as trustee for another conclusive evidence of the existence of the trust. Parkman v. Bank, 151 Mass. 218, 24 N. E. 43. While the plaintiff excepted to the ruling given, this point has not been argued, except as it is embraced in the argument relating to the refusal to give the two instructions requested. As we are of opinion that the judge properly refused to rule as requested, the order must be, exceptions overruled.

Appeal of FASSETT et al.

(31 Atl. 686, 167 Pa. St. 448.)

Supreme Court of Pennsylvania. April 15, 1895.

Appeal from court of common pleas, Wyoming county.

Under a judgment in favor of John B. Fassett and Mary J. Fassett, in an action by them against H. C. Frost, certain real estate of H. C. Frost was sold, and from the decree distributing the fund derived therefrom said John B. Fassett and Mary J. Fassett appealed. Reversed.

The land formerly belonged to Jason Frost, and after his death it was taken by his son, H. C. Frost, in partition proceedings, charged with a certain sum, the interest on which was to be paid annually to Mary Frost, widow of Jason Frost. The fund, besides being claimed by the Fassetts under their judgment, was claimed by N. H. Davis & Co. and Sholer & Clark, under assignment by the widow of the arrearages of her annual charge, which, they claim, has not been paid or satisfied. To defeat this claim the Fassetts proved that the widow gave H. C. Frost a receipt for all arrearages down to and including the year 1888, and contended that this was a discharge or relinquishment thereof pro tanto. The decree appealed from gave no effect to the receipt.

Chas. E. Terry and E. J. Jorden, for appellants. Wm. Maxwell, Charles M. Lee, and James W. Piatt, for appellees.

GREEN, J. The auditor found, upon abundant testimony, "that Mary Frost gave to her son, Henry C. Frost, a written receipt for all arrearages of dower due her up to April 20, 1888." It is beyond all question that by this action the widow intended to give, and did give, to her son, absolutely and without any condition, all the arrearages of dower which were due her to the date mentioned. A title by gift is just as good as a title by deed, and cannot be revoked after the gift is completed. In this case the donor has never revoked the gift, or attempted to do so; and it is not in the power of any other person to do so for her, nor could she do so herself, after it was completed. The subject of the gift here was money due to the donor from the donee. If the money due had actually been paid by the donee to the donor, and the receipt given, and then the donor had handed back the money to the donee, no possible question could have arisen as to the effect of the transaction. But the handing of the money back and forth was entirely unnecessary, and therefore the giving of a receipt was just as efficacious to extinguish the title of the donor to the money as if its bodily transmission from the one to the other, and back again, had actually taken place. The question arises only between the donor and donee. No rights of creditors of the donor are involved, because there were none. As to any subsequent assignees, they could not take what the donor could not give them, and they could only take what she had to give; that is, moneys due for dower after April 20, 1888. These considerations are quite sufficient to dispose of the case.

Some attempt is made to affect the quality of the gift by an effort to clothe it with a condition, but it is altogether futile. It is argued that because no money was actually paid, and the recognizance was not surrendered, there was no good legal gift. As to the surrender of the recognizance, it was neither feasible nor essential to the gift. Further payments in the future would become due under it, and it could not be surrendered by the widow, even if she had so desired. As to the payment of money for the receipt, if that were necessary, there could be no such thing as a gift of money due to the donor. If it had to be purchased and paid for, it would not be a gift at all.

The effort to prove a condition is equally untenable. The argument is founded upon the testimony of the widow. She says, "I signed his receipt, but I never received any money, but I supposed he would pay me when he got able." Of course, her supposition on this subject is only a supposition, and not a condition of the gift, in the least possible sense. Again, she testified, "He said, if I needed it, and he got able, he would pay me, notwithstanding I had given him this receipt." As it has not yet been proved that her son has ever been able to pay this money back, or that his mother needed it, this remark of the son would be utterly ineffectual to defeat the gift, even if it had amounted to a condition of the gift. But it never had any such quality. It was not exacted by the mother as a term of the gift, nor could it be pretended to be of any higher dignity than a mere casual remark of the son. It had nothing to do with the gift. The numerous authorities cited in the argument for the appellees are altogether wide of the mark. They are not relevant to the question at stake here. The subject of the gift was moneys due to the donor for arrearages of dower due to her by the donee. She gave them to him in the only way in which such a gift could be made, viz. by a receipt in full to a certain date. That act was absolute, unqualified, completed by a delivery of the receipt to the donee, never questioned by the donor, and completely efficacious to convey her title to the arrearages due. That is all that is necessary to make a complete and perfect gift of such a subject-matter. The assignments of error are all sustained. The decree of the court below is reversed, at the cost of the appellees, and the record is remitted, with instructions to distribute the fund in accordance with this opinion.

HATCHER v. BUFORD et al.

(29 S. W. 641, 60 Ark. 169.)

Supreme Court of Arkansas. Jan. 12, 1895.

Appeal from circuit court, St. Francis county; Grant Green, Jr., Judge.

Bill by M. E. Hatcher against A. B. Buford and others to recover dower upon renunciation of the provisions made for her in her husband's will in lieu of dower, and to have a transfer of bank stock and notes made by him to defendant declared fraudulent as against her right of dower therein. From a judgment denying dower in the personalty so transferred, and allowing it in one-half the realty in fee, both parties appeal. Affirmed as to realty and notes, but reversed as to bank stock.

T. A. Hatcher, a prosperous merchant of Forrest City, Ark., died December 10, 1891. He had never had any children, but left a widow, M. E. Hatcher, the appellant. About two months prior to his death, he sold an interest in his store to Walter Buford, his nephew, taking in payment therefor notes of the said Walter amounting to $2,500. These notes Hatcher indorsed to his sister Mrs. A. B. Buford, and mailed them to her on the 9th of October, 1891. About one month before his death, Hatcher directed his agent to buy $4,000 of bank stock, and, about 10 days before, $1,000 more. This stock was issued in the name of Mrs. Buford, and was delivered by Hatcher's agent to her son Walter. Hatcher made a will, in which, among other bequests, was a provision for his wife, and Mrs. Buford was declared residuary legatee and devisee. Appellant's bill (omitting nonessentials) sets up a renunciation of the will, and that the disposition of the notes and bank stock in the manner indicated was done with intent to defeat appellant's dower, and was fraudulent; that the lands of which her husband died seised were a new acquisition. She prays to be endowed of half the notes and bank stock, also of half the fee in the real estate. The answer denied the fraud, claimed an absolute gift of the personalty, and that dower in the realty should be of one-half for life. The decree refused dower in the notes and bank stock, but granted it in one-half the real estate in fee. Both parties have appealed, and the issues presented by this record are: First. Was there a gift? Second. If a gift, was it inter vivos or causa mortis? Third. If a gift causa mortis, did it defeat the widow's dower? Fourth. Should dower in the realty be according to the law at the time of the marriage or at the death of the husband?

N. W. Norton, for appellant. John Gatling and Rose, Hemingway & Rose, for appellees.

WOOD, J. (after stating the facts). 1. Was there a gift? The only controversy on this point was as to the delivery. Delivery, of course, is essential to a gift. 3 Pom. Eq. Jur. § 1150; Ammon v. Martin, 59 Ark. 191, 26 S. W. 826. Mrs. Buford testified that the bank stock was not delivered to her until after her brother's death, while Walter, her son, testified that he delivered the bank stock to his mother before Hatcher's death. No question is raised as to the delivery of the notes. The evidence supports the finding of the chancellor that there was a gift of the bank stock and notes.

2. Was the gift inter vivos or causa mortis? The donatio inter vivos, as its name imports, is a gift between the living. It is perfected and becomes absolute during the life of the parties. The donatio causa mortis, literally, "is a gift in view of death." But this does not give us an adequate conception of the gift as it is understood and treated by the authorities. We find from an examination of these that where one, in anticipation of death from a severe illness then afflicting him, or from some imminent peril to his life, to which he expects to be exposed, makes a gift accompanied by the delivery of the thing given, either actual or symbolic, which is accepted by the donee, the law denominates such a gift a "donatio causa mortis." 3 Pom. Eq. Jur. § 1146 et seq.; 3 Redf. Wills, p. 322, § 42 et seq.; 2 Beach, Eq. Jur. p. 1144, § 1062; 1 Woerner, Adm'n, §§ 57, 58; Thornt. Gifts, p. 12, c. 1; 1 Williams, Ex'rs, 844; Gourley v. Linsenbigler, 51 Pa. St. 345; 2 Kent, Comm. 444; 2 Bl. Comm. 514; Hebb v. Hebb, 5 Gill, 506; Schouler, Pers. Prop. § 135. Were the notes and bank stock in controversy given under such circumstances? Both the pleadings and the proof settle conclusively that the gifts were in contemplation of the near approach of death from the illness then afflicting the donor, Hatcher, to wit, consumption. The gifts being made during the last illness, and when all hope of recovery was gone, the presumption is they were causa mortis. Merchant v. Merchant, 2 Bradf. Sur. 432; 3 Pom. Eq. Jur. § 1146, supra; Lawson v. Lawson, 1 P. Wms. 441; Henschel v. Maurer, 69 Wis. 576, 34 N. W. 926. The conditions inhering in a gift made under such circumstances do not have to be expressed. The law attaches them as a part of the essential nature of a gift causa mortis. 2 Beach, Eq. Jur. § 1063; Williams v. Guile, 117 N. Y. 343, 22 N. E. 1071; Grymes v. Hone, 49 N. Y. 17; Emery v. Clough, 63 N. H. 553, 4 Atl. 796. But it must not be forgotten that an absolute gift—one inter vivos—may be made by one upon his deathbed, and who is aware of the near approach of death from his then ailment. Thornt. Gifts, p. 24, § 21, and authorities cited. Is there anything in the proof to overcome the presumption of gifts causa mortis? As to the notes, the testimony shows that Hatcher was up and at his store on the day these were executed; that they were delivered on the same day; and that the donor was able to drive out after this transaction. It also shows that it was Hatcher's desire to give to his nephew Walter Buford an interest in the store, and

that Walter declined to take it. The notes were executed for this interest, and immediately indorsed by the payee, the donor, to the donee, the mother of the maker of the notes. The gift to his nephew of an interest in his mercantile business seems to have been the real purpose of the donor. Such a gift, of course, would have been incompatible with the limitations which the law imposes upon the use and enjoyment of the subject-matter of gifts causa mortis, and the attribute of revocability attaching to such gifts. 2 Beach, Eq. Jur. § 1093; 3 Redf. Wills, pp. 322–343. We think the time and circumstances of the gift of the notes, as indicated by the proof, supports the chancellor's finding that this was a gift inter vivos. The same, however, cannot be said of the bank stock. Hatcher was upon his deathbed, and unable to attend to any business, when this was given. Four thousand was taken out about one month before his death, and one thousand only about ten days before. It was not delivered until a few nights before his death. We find nothing whatever in the proof to take the bank stock out of the presumption that it was a gift causa mortis, and nothing to support the chancellor's conclusion as to this.

3. Being a gift causa mortis, did it defeat the widow's dower? Section 2541, Sand. & H. Dig., provides: "A widow shall be entitled, as a part of her dower, absolutely and in her own right to one-third part of the personal estate, including cash on hand, bonds, bills, notes, book accounts and evidences of debt whereof the husband died seised or possessed." Was the donor seised or possessed of the bank stock at the time of his death? The terms "seised" or "possessed," as thus used with reference to personalty, mean simply ownership, which carries with it the actual possession, or a right to the immediate possession. The real inquiry, then, is as to when the title or property in the subject-matter of a donatio causa mortis passes. We are aware that there is conflict and confusion in the authorities upon this point, doubtless growing out of the modes of donatio causa mortis recognized originally by the Roman jurisprudence, whence the doctrine is derived. Under one of these, the subject-matter of the gift became at once the property of the donee, but on condition that he should return it to the donor in the event of his recovery. Under another, the gift was made upon condition that the thing given should become the property of the donee only in the event of the donor's death. Under the former, delivery was essential; under the latter, it was not. Thornt. Gifts, p. 44; Ward v. Turner, 2 Ves. Sr. 431; Abb. Dese., Will & Adv. 169. Mr. Roper, in his work on Legacies, tells us that, after the contest upon the subject had subsided, Justinian gives a definition of "donatio causa mortis," which alone is the proper one. 1 Rop. Leg. 1. Mr. Pomeroy quotes this definition, and translates it as follows: "A donatio causa mortis is that which is made in expectation of death; as when anything is so given that, if any fatal accident befalls the donor, the person to whom it is given shall have it as his own; but if the donor should survive, or if he should repent of having made the gift, or if the person to whom it has been given should die before the donor, then the donor shall receive back the thing given." 3 Pom. Eq. Jur. § 1146. Judge Redfield, in his work on Wills, says: "The conclusion of Justinian's definition seems to embrace the essentials of the gift, viz. the gift is such that the donor prefers himself to retain dominion over it rather than have the donee acquire it. But he prefers the donee should have it rather than his heir." 3 Redf. Wills, 322. Those authorities which hold that the property in the thing given passes upon delivery and during the life of the donor have obviously followed the kind of donatio causa mortis referred to supra, existing under the Roman law prior to Justinian's definition, which recognized the subject-matter of the gift as becoming at once the property of the donee, defeasible upon a condition subsequent, and under which delivery was essential. This is a formidable position, and supported by high authority. Basket v. Hassell, 107 U. S. 602, 2 Sup. Ct. 415; Chase v. Redding, 13 Gray, 418; Marshall v. Berry, 13 Allen, 43; Thornt. Gifts, § 46; Nicholas v. Adams, 2 Whart. 17; Daniel v. Smith, 64 Cal. 346, 30 Pac. 575; Emery v. Clough, 63 N. H. 552, 4 Atl. 796; Schouler, Pers. Prop. § 137; Dole v. Lincoln, 31 Me. 422. Since the decision of Lord Hardwicke in Ward v. Turner, 2 Ves. Sr., supra, it has been the settled law of England that delivery is essential in gifts causa mortis; and there has never been any controversy upon that point in this country. Since delivery is an essential element to complete the transfer of title or property in personalty (Schouler, Pers. Prop. § 87), the authorities holding to the view that the title passes and becomes vested in the subject-matter of a donatio causa mortis during the life of the donor are dominated by the idea of delivery. But, while delivery is a prerequisite to the transfer of title, it does not follow that there is always a transfer of title where there is a delivery, nor that the delivery of the chattel and the transfer of the title are coeval, in cases where the title is transferred. We think the better doctrine upon the transfer of the title to gifts causa mortis is that which accords with Justinian's definition, and recognizes the subject-matter of the gift as becoming the property of the donee in the event of the donor's death; i. e. the donor's death is a condition precedent to the vesting of the title to the thing given in the donee. This seems to be the rule adopted by the English courts of chancery, and is supported also by eminent American courts and text writers. 1 Williams, Ex'rs, 782; 3 Pom. Eq. Jur. § 1146; Baker v. Smith (N. H.) 23 Atl. 52; Merchant v. Merchant, 2 Bradf. Sur. 432;

Gardner v. Parker, 3 Madd. 184; Edwards v. Jones, 1 Mylne & C. 226; Staniland v. Willott, 3 Macn. & G. 664 et seq.; Wells v. Tucker, 3 Bin. 370.

This view is certainly more consonant with the conditions which all the authorities agree attach to gifts of this kind; viz. that the reclamation of the donor, or his recovery from existing illness or escape from peril apprehended, or the death of the donee before that of the donor, will each, ipso facto, revoke the gift. Conser v. Snowden, 39 Am. Rep. 368; Merchant v. Merchant, supra. This doctrine we have already approved in Ammon v. Martin, 59 Ark. 191, 26 S. W. 826, where, in speaking of donatio causa mortis, we said: "The title to the thing given remains in the donor, and the gift is subject to revocation at any time prior to his death." True, we also said in this case, with reference to the delivery of a note by the donor, while on her deathbed, to the agent of the donee, "that this was sufficient to make the gift complete, no matter what was its character." But this latter statement was made solely in regard to the delivery. It might be construed, however, as applying to the gift as a whole, and not simply to the element of delivery. In that view the language would be inaccurate. In Ammon v. Martin, supra, it was not necessary for us to distinguish between gifts inter vivos and causa mortis, the only question there being, was there a gift? But it may be said that this view abolishes all distinction between gifts causa mortis and testamentary dispositions, since the donatio causa mortis is wholly inchoate and conditional, not passing title until the donor's death. Many authorities do speak of the donatio causa mortis as but another form of testamentary disposition, and liken it unto the testamentary disposition, for the reason that it is revocable during the donor's life, is subject to his debts if there be a deficiency of assets, and does not become an absolute gift until the donor's death. Jones v. Brown, 34 N. H. 439; Baker v. Smith (N. H.) 23 Atl. 82; 2 Kent, Comm. 445; Schouler, Pers. Prop. 138. But while, in these particulars, it resembles a testamentary disposition, it differs from it, in that the subject-matter of the gift is delivered to the donee during the life of the donor, and at his death does not pass into the hands of the executor or administrator, but remains with the donee. This is not because the property or title has passed to the donee during the life of the donor, or that the donor is not actually seised in law at the time of his death, but because it is one of the peculiar characteristics of this species of gift that, at the donor's death, the donee takes, instead of the heir, according to the intention of the donor, as manifested during his life by delivery to the donee. It should be observed in this connection that of the cases cited supra, holding to the view that title vested in the donee during the life of the donor, Chase v. Redding, 13 Gray, 418, was the only one in which the widow was a party; but Marshall v. Berry, 13 Allen, 43, stands on a parity with it by analogy, and the supreme court of Massachusetts is undoubtedly committed to the doctrine that donations causa mortis are valid against the rights of the widow. But the dower rights of the widow rest on a different basis to that of a child or heir. Thayer v. Thayer, 14 Vt. 107, and authorities there cited. Hence it may be questioned as to whether any case is an authority against the dower rights of the widow where she is not a party, although holding that title vests in the donee during the life of the donor. For instance, in Emery v. Clough, 63 N. H. 552, 4 Atl. 796, supra, the supreme court of New Hampshire maintains as strongly as in any of the cases that title passes during the life of the donor to the subject-matter of a gift causa mortis. But in the case of Baker v. Smith (N. H.) 23 Atl. 82 (a much later case), the question being whether a married woman could deprive her husband of his statutory distributive share of her personal estate by a gift causa mortis, the same court said: "What she cannot do in this respect by will she cannot do by another form of testamentary disposition, which is of the nature of a legacy, and becomes a valid gift only upon the decease of the donor." So, also, Mr. Schouler, who, in his work on Personal Property, contends that the better doctrine is the one which treats the title as vesting upon delivery during the donor's life, yet maintains, in his work on Wills, that "the same principles which regulate the wife's testamentary disposition of her personal property should likewise regulate her gift causa mortis." Schouler, Wills, § 63; Schouler, Pers. Prop. § 137. And the same author, in commenting upon Marshall v. Berry, supra, after saying, "This decision is to be regretted," continues: "The implied conditions of revocation which accompany such gifts make the disposition so nearly ambulatory, like that of a will, that the policy of the law should not differ in the two cases, except to discountenance such gifts as much as possible." Schouler, Wills, § 63. Judge Redfield, upon this subject, says: "It seems questionable whether a man of substance can be allowed to dispose of his whole estate, and leave his widow a beggar, by means of this species of gift, which is clearly of a testamentary character, where the statute expressly provides that the widow may waive the provisions of the will, and come in for her share of the personal estate under the statute by way of distribution." And he adds: "It is possible the American courts have felt too reluctant to recognize the difference in this respect between the widow and next of kin." 3 Redf. Wills, 324, note. Under our law, a man may deprive his children of their inheritance by his will if he names them. So, also, he may deprive them by a donatio causa mortis. But he

cannot deprive the widow of her dower rights by either. And this for the reason, in both instances, that he dies "seised" of the property so conveyed. This, in our opinion, is the only consistent and logical conclusion; for if the title passes during the donor's life, and he has the absolute right to dispose of his personalty as he pleases, which he has, how can it be said that the donee's rights are inferior to those of the widow, except upon the doctrine above enunciated? This conclusion makes it unnecessary for us to pass upon the question of fraud, though many courts of high authority announce that fraud may be predicated upon such a transaction as this record discloses. Manikee v. Beard, 85 Ky. 20, 2 S. W. 545; Davis v Davis, 5 Mo. 183; Stone v. Stone, 18 Mo. 389; Tucker v. Tucker, 29 Mo. 350; Straat v. O'Neil, 84 Mo. 68; Thayer v. Thayer, 14 Vt. 107. However, the majority of us are not satisfied with their reasoning or their conclusions. Lines v. Lines, 142 Pa. St. 149, 2 Atl. 809; Pringle v. Pringle, 59 Pa. St. 281, contra.

4. The fourth and last question, is the widow endowed according to the law at the time of marriage or at the death of her husband? is easy of solution, especially in view of the comparatively recent deliverances of our own court. In Smith v. Howell, 53 Ark. 279, 13 S. W. 929, the court said: "The inchoate right of dower during the lifetime of the husband is not an estate in land; it is not even a vested right, but a mere intangible, inchoate, contingent expectancy. The law regards it as an incumbrance on the husband's title. * * * She joins with her husband, not to alienate any estate, but to release a future contingent right." See, also, Hewett v. Cox, 55 Ark. 235, 15 S. W. 1026, and 17 S. W. 873, where same language is quoted. In Littell v. Jones, 56 Ark. 139, 19 S. W. 497, the court, through Judge Hemingway, again said: "Persons who may be entitled to inherit under existing laws may suffer detriment by changes in the law that change the course of devolution, but there is no such thing as a vested right in a prospective heirship, or in the maintenance of the laws of descent, and, though their charge disappoint reasonable expectations, it comes within no constitutional inhibition." See, also, Gregley v. Jackson, 38 Ark. 492. Nothing more need be said. It is not true, as contended by counsel, that the wife acquired a vested remainder in the real estate of which her husband was seised during coverture. The argument of counsel for residuary devisee, being founded upon a false premise, however plausible and strong, must inevitably lead to an erroneous conclusion. Those of our decisions which mention dower as a vested right only used the term "vested" in the sense of assuring whatever right the law gave, and not in the sense that dower rights could not be affected or changed by a change in the law itself. It follows that the devisee, Mrs. Buford, could only claim under the law as it was at the death of Hatcher.

The decree of the chancellor is affirmed as to the notes and real estate. As to the bank stock, it is reversed, and the cause is remanded, with directions to enter a decree conforming to this opinion.

See Yingst v. Lebanon & A. St. Ry. Co., 167 Pa. St. 438, 31 Atl. 687.

ZELLER v. JORDAN et al. (No. 15,775.)

(38 Pac. 640, 105 Cal. 143.)

Supreme Court of California. Dec. 21, 1894.

Department 2. Appeal from superior court, city and county of San Francisco; Jas. M. Troutt, Judge.

Action by H. J. Zeller against one Jordan and others. From a judgment for defendants, plaintiff appeals. Affirmed.

F. J. Castelhun, for appellant. Hepburn Wilkins, E. B. Martinelli, and W. S. Goodfellow, for respondents.

DE HAVEN, J. Action to recover from the defendant, the German Savings & Loan Society, the sum of $19,807.74, deposited with said defendant by Sophia Steineke, who afterwards became the wife of plaintiff, and is now deceased. The defendant Jordan is the executor of the last will of the said Sophia, and is made a party to this action by reason of the fact that he claims said deposit as a part of the estate of his said testator. The superior court rendered judgment in his favor, and the plaintiff appeals. The plaintiff alleges in his complaint that his deceased wife, in the month of January, 1886, "in consideration of the love and affection she had and bore unto plaintiff, and also for other good considerations her thereunto moving, made an assignment in writing" of her demand against the German Savings & Loan Society, arising out of the deposit before referred to, and that he "has ever since been, and still is, the lawful owner thereof, and of all accrued dividends thereon." The action was tried by the court without a jury, and the court found that the deceased never assigned to plaintiff, by way of gift or otherwise, her said demand against the German Savings & Loan Society; and the only question necessary to be considered on this appeal is whether this finding of the trial court is sustained by the evidence.

1. It appears from the evidence that the deceased wife of plaintiff was subject to epilepsy, and died in March, 1893. The immediate cause of her death is not shown. There was also evidence tending to prove that, between the years 1883 and 1886, she signed and delivered to the plaintiff an undated check drawn by her in his favor on the German Savings & Loan Society for the sum of $18,807.24, with interest, and to be charged to her account as a depositor with that bank. The pass book representing the deposits so drawn against was not delivered to plaintiff, and under the rules of the said defendant bank, which were printed in said pass book, deposits entered therein could only be withdrawn by an order accompanying the pass book. The plaintiff was the only witness examined in relation to the making of the check, and he testified that, at the time it was signed and delivered, his wife was not confined to her bed, and was well, and further said: "The check was given to me in consideration of love and affection. That was the reason for getting it. That was the only consideration. It was the understanding between me and my wife, at the time this check was signed, that I would not use the check or present it until after her death, and nothing was to be done with it until after my wife died. I was not to touch anything in that book of that money until after my wife's death." The check was not presented to the defendant bank until some time after the death of plaintiff's wife. It is clear to us that, under this evidence, the finding of the court that there was no completed gift or assignment to plaintiff of the fund in controversy must be sustained. We do not find it necessary to pass upon the question whether a bank check uncollected in the lifetime of the drawer, and unaccompanied by a delivery of the pass book, which, under the depositor's contract, must be presented with the order for a withdrawal of the deposit, is effectual as a donatio causa mortis. There was here nothing in the nature of such a gift. "A gift in view of death is one which is made in contemplation of the fear or peril of death, and with intent that it shall take effect only in case of the death of the giver." Civ. Code, § 1149. "To constitute a donatio causa mortis, the gift must be made in contemplation of the near approach of death by the donor." Daniel v. Smith, 64 Cal. 349, 30 Pac. 575. In some cases it is said: "The rule of law, in such cases of gifts made in prospect of death, demands for their validity that the proof shall show the existence of a bodily disorder, or of an illness which imperils the donor's life, and which eventually terminates it." Williams v. Guile, 117 N. Y. 349, 22 N. E. 1071. But perhaps the law upon this point is more accurately stated in Ridden v. Thrall, 125 N. Y. 579, 26 N. E. 627, as follows: "The gift must be made under the apprehension of death from some present disease, or some other impending peril, and it becomes void by recovery from the disease or escape from the peril. It is also revocable at any time by the donor, and becomes void by the death of the donee in the lifetime of the donor." The evidence here entirely fails to show that the deceased delivered the check referred to under any belief of or apprehension of the peril of death from any existing disease, and for this reason its delivery cannot be sustained as a gift in view of death. "A gift mortis causa, made while the donor is in full health, or while suffering from a disease that in reasonable expectation will not produce death in the near future, is invalid. Thus, a deposit made in a bank while the donor was in full health or medium health, 'payable also to A. in case of the death of' the donor, was held to be an invalid gift." Thornt. Gifts, § 28.

2. And the evidence also fails to show a gift inter vivos. "A gift inter vivos, to be valid, must take effect at once, and there must be nothing to be done essential to the validity; and, if it is to take effect in the future, there is no gift, but only a promise to give. So a

gift to take effect at the death of the donor is void." Thornt. Gifts, § 76. In other words, to constitute such a gift, there must be an immediate transfer of the title, and the donor must relinquish all present right to or control over the thing given. The donor here retained her dominion over the fund against which the check was drawn, and the check was delivered to the plaintiff, under an agreement that he was not to use or present it until after the death of the wife, or, as stated by the plaintiff in his testimony, "I was not to touch anything in that book of that money until after my wife's death." Judgment and order affirmed.

We concur: McFARLAND, J.; FITZGERALD, J.

DORAN v. DORAN. (No. 15,090.)

(99 Cal. 311, 33 Pac. 929.)

Supreme Court of California. Aug. 16, 1893.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; Walter H. Levy, Judge.

Action by Margaret Doran against James Doran to have a trust declared in land and money. Judgment for defendant. Modified.

James Gartlan, for appellant. Robert Y. Countryman, for respondent.

BELCHER, C. On the 30th day of June, 1887, John Doran was the owner of a certain lot of land in the city of San Francisco, and of $770, money on deposit to his credit in the Hibernia Savings & Loan Society of San Francisco. On that day he executed to the defendant, James Doran, a deed of the lot and an assignment in writing of the pass book showing the amount to his credit in the said bank. John and James were brothers, and the sons of the plaintiff. The plaintiff seeks by this action to have a trust declared in her favor as to the real and personal property so transferred. The complaint alleges, in substance, that John was moved and induced to convey the said lot and assign the said bank account to the defendant solely by reason of the confidence he had in defendant, and because of the promise defendant then made to reconvey the lot upon request to his grantor, and to hold for his use the money, and the further promise, in the event of John's death, to convey the lot to plaintiff, and to pay to her so much of the said money as might remain in his (defendant's) hands; that John died on the 5th day of July, 1887, before any reconveyance of the land had been made, and leaving intact in defendant's hands the whole sum of money transferred to him; and that plaintiff had demanded of defendant that he convey to her the said land, and pay to her the said money, but he refused, and still refuses, to do so, except that he had paid to her $100 of the money. Wherefore judgment is asked "that he, defendant, be declared a trustee for plaintiff of said land, and for a conveyance thereof to her; that he, defendant, be declared a trustee for plaintiff in the sum of $670, and that he be directed to pay such sum to her, together with the interest found due, and for costs of suit." The answer to the complaint was a general denial. The case was tried by the court, and the findings were, in effect, that the said conveyance and assignment were absolute, and were not made by reason of any confidence John had in defendant, nor upon any promise of defendant to reconvey the lot to John, or to hold the money for his use, nor upon any promise, in the event of John's death, to convey the lot or pay over any part of the money to the plaintiff. Judgment was accordingly entered that plaintiff take nothing by the action, and that defendant recover from her his costs and disbursements therein. From this judgment, and an order denying her motion for new trial, the plaintiff appeals.

The only point made for reversal which need be noticed is that the findings were not justified by the evidence. The proceedings at the trial are briefly stated in the record as follows: Plaintiff introduced in evidence the deed and pass book in question; the deed expressing a nominal consideration, and the pass book, numbered 108,800, showing a balance to the credit of the depositor of $770. "Proof was then made that on June 30, 1887, John Doran was lying dangerously ill at St. Mary's Hospital, San Francisco, and expressed a desire to settle his affairs; that the sick man knew that his mother, Margaret Doran, the plaintiff, was his heir at law; that, for the purpose of avoiding the expense and delay of probate proceedings, John determined to transfer all his property in trust; that he was aware of the risk he ran in making such transfer, but declared that he would make his brother, James, the defendant, his trustee, knowing that his said brother would do what was right; that thereupon John conveyed to defendant the aforesaid lot of land on Jersey street, and assigned to said defendant the said pass book No. 108,800. It was also proven that John Doran had died on the 5th day of July, 1887, intestate, unmarried, and without issue, and that his father had predeceased him. The defendant, James Doran, testified in substance: "I am defendant in this action. John Doran died on or about the 5th day of July, 1887. He was my brother. The plaintiff, Margaret Doran, is my mother, and mother of deceased. My father is dead. My brother, John, was never married. I was present when John made the transfer of the lot on Jersey street and the Hibernia Bank pass book. What my brother meant when he said I would do what was right was that I would reconvey the property to him if he recovered from his then sickness. Nothing further was said by John on the subject. On the morning of the day of his death, John said to me he was feeling awful bad; that he thought he was going to die; that I should hurry down to the Hibernia Bank, and get out his money, and bring it up to him. I went accordingly to the bank, and drew out his money. I was scarcely absent more than 15 minutes, but when I got back John was dead." It was further proven that, about a week after the death of John, the defendant went to the office of the attorney who had drawn up and witnessed the deed and assignment by which the deceased had transferred his property; that the defendant asked said attorney when the matter would come up in court; that the attorney there and then told defendant there would be no court proceedings; that to avoid all such proceedings his brother had transferred the property to him; that he, defendant, was trustee of the property, and the duty devolved upon

him to carry out the wishes of deceased; that defendant left the office without making any reply."

1. Upon this record of the evidence we do not think the findings in relation to the real property can be disturbed. An express trust in real property can only be created or declared by a written instrument subscribed by the trustor or trustee. Civil Code, § 852. There was therefore no express trust in favor of the grantor or the plaintiff, and no facts are stated from which a trust by operation of law must necessarily arise in her favor. So far as appears, the conveyance was made by the grantor of his own motion, and without any solicitation, undue influence, or fraud on the part of the grantee; and it may have been intended to be absolute in case of the grantor's death, and to vest the title in fee simple in the grantee; and that it was so intended must, in view of the findings, be presumed.

2. As to the bank account the law is different. An express or implied trust in relation to personal property may be declared and proved by parol, (Hellman v. McWilliams, 70 Cal. 449, 11 Pac. Rep. 659; Perry, Trusts, § 86;) and here the undisputed evidence on the part of the plaintiff shows that the pass book was assigned to the defendant in trust for the assignor. The respondent, however, contends that the assignment and delivery to him of the pass book constituted a complete gift of the money causa mortis. Conceding this to be so, still a gift causa mortis may be revoked by the donor at any time during his life, and without the consent of the donee. Civil Code, § 1151; Daniel v. Smith, 64 Cal. 349, 30 Pac. Rep. 575; Merchant v. Merchant, 2 Bradf. Sur. 432; Parker v. Marston, 27 Me. 196. Here the respondent's own testimony very clearly shows that the gift, if made, was revoked by the donor before he died. He testified that, on the morning of the day of his death, John told him to "hurry down to the Hibernia Bank, and get out his money, and bring it up to him. I went accordingly to the bank, and drew out his money; * * * but when I got back John was dead." This plainly indicates that John still claimed the money as his own, and intended to again take it into his possession. Under these circumstances it must be held that the respondent held the money in trust and as a part of the estate of John, and that the plaintiff, as the only heir of John, had a right to have the trust enforced, and the money paid over to her.

We advise that the judgment and order, so far as they relate to the real property, be affirmed, and that, so far as they relate to the money, be reversed, and the cause remanded for a new trial.

We concur: SEARLS, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order, so far as they relate to the real property, are affirmed, and, so far as they relate to the money, are reversed, and the cause remanded for a new trial.

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